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v. 2916

No. 14562

United States
Court of Appeals
for the Ninth Circuit.

LIBBY, McNEIL & LIBBY, a Corporation, and
YAKUTAT & SOUTHERN RAILWAY, a
Corporation,

Appellants,

vs.

THE CITY OF YAKUTAT, ALASKA,

Appellee.

Transcript of Record
In Two Volumes

Volume II
(Pages 333 to 483)

Appeal from the District Court
for the District of Alaska,
Division Number One.

FILED

JAN 26 1955

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United States Court of Appeals
for the Ninth Circuit
No. 13455

LIBBY, McNEILL & LIBBY, a Corporation, and
YAKUTAT AND SOUTHERN RAILWAY,
a Corporation,

Appellants,

vs.

CITY OF YAKUTAT, ALASKA,

Appellee.

MANDATE

United States of America—ss.

The President of the United States of America

To the Honorable, the Judges of the United States
District Court for the Territory of Alaska, Di-
vision Number One:

Greeting:

Whereas, lately in the United States District Court for the Territory of Alaska, Division No. One, before you or some of you, in a cause between City of Yakutat, Plaintiff, and Libby, McNeill & Libby, a corporation, and Yakutat and Southern Railway, a corporation, Defendants, No. 6302-A, a judgment was duly filed and entered on the 6th day of March, 1952, which said judgment is of record in said cause in the office of the clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof,

And Whereas, the said Libby, McNeill & Libby, a corporation, and Yakutat & Southern Railway, a

Corporation, appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Court of Appeals for the Ninth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

And Whereas, on the 22nd day of April, in the year of our Lord, one thousand nine hundred and fifty-three, the said cause came on to be heard before the said United States Court of Appeals for the Ninth Circuit, on the said transcript of record, and was duly submitted:

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the order of the said District Court in this Cause be, and hereby is, reversed, with costs in favor of the appellants and against the appellee.

You, Therefore, Are Hereby Commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Fred M. Vinson, Chief Justice of the United States, the nineteenth day of August, in the year of our Lord one thousand nine hundred and fifty-three.

[Seal] /s/ PAUL P. O'BRIEN,
Clerk, United States Court of Appeals for the
Ninth Circuit.

Costs—

Clerk	\$ 25.00
Printing record	694.94
Attorney	
<hr/>	
Total	\$719.94

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

Civil Action No. 6581-A

In the Matter of:

THE DELINQUENT AND SUPPLEMENTAL
DELINQUENT TAX ROLL OF REAL AND
PERSONAL PROPERTY FOR THE CITY
OF YAKUTAT, ALASKA, FOR THE
YEARS 1948 AND 1949.

LIBBY, McNEILL & LIBBY, a Corporation, and
YAKUTAT & SOUTHERN RAILWAY, a
Corporation,

Objectors.

MOTION TO FILE MANDATE AND FOR
JUDGMENT ON MANDATE

Objectors move that the mandate, heretofore
issued on August 19, 1953, by the United States
Court of Appeals for the Ninth Circuit on appeal
to it by the Objectors from the Order of Sale made
and entered by this Court on April 25, 1952, be filed

and that judgment on said mandate be entered herein.

Dated at Juneau, Alaska, October 7, 1953.

ROBERTSON, MONAGLE &
EASTBAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Notice

To the City of Yakutat, Alaska, and Its Attorney,
Wm. L. Paul, Jr.:

You are hereby notified that Objectors will present the foregoing motion with the attached judgment on mandate to the above-entitled Court at Juneau upon its first call of the motion calendar upon its return to Juneau, and will request that said mandate be filed and said judgment on the mandate be entered.

Dated at Juneau, Alaska, October 7, 1953.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Affidavit of mail attached.

[Endorsed]: Filed October 8, 1953.

[Title of District Court and Cause.]

JUDGMENT ON MANDATE

Whereas, the United States Court of Appeals for the Ninth Circuit heretofore on August 19, 1953, issued its mandate reversing that certain Order of Sale made herein, by this Court on April 25, 1952, and assessing costs of \$719.94, consisting of Clerk's fees, \$25.00, and printing record, \$694.94 against the City of Yakutat, Alaska, an Alaskan municipal corporation,

Now, Therefore, on Objectors' motion, it is hereby ordered, adjudged and decreed that said mandate be filed by the Clerk of this Court and that this Court's Order of Sale made and entered herein on April 25, 1952, be and it is hereby vacated and set aside, and that Objectors Libby, McNeill & Libby and the Yakutat & Southern Railway have judgment against the City of Yakutat, Alaska, for \$719.94, costs assessed by the Appellate Court, and for their costs incurred in this Court.

Done in open Court this 8th day of May, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed May 8, 1954.

[Title of District Court and Cause.]

OBJECTIONS TO FORM OF JUDGMENT

Applicant objects to the form of judgment tendered by objectors for the reason that since the opinion of the Court of Appeals and in conformity therewith, applicant has applied the funds paid by objectors to the payment of their personal property taxes and to their real property taxes, both including penalty and interest, thereby exhausting any liability due on personal property taxes, penalty and interest, and partially paying their real property taxes, as had theretofore been directed by objectors; and therefore there is a balance due on the real property taxes which should be determined by this Court in favor of applicant.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

Received May 6, 1954.

[Title of District Court and Cause.]

MOTION FOR TRIAL

Applicant moves that this matter be set down for trial for 2:00 p.m. May 11, 1954, or on the alternative that the evidence of the witness, Dorothy Henry, a resident of the City of Yakutat, and essential to the trial of this cause be preserved. The evidence expected to be adduced from her is that she is City Clerk and can identify the assessment and

tax roll of applicant showing a segregation of personal and real property of objectors.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

To Robertson, Monagle & Eastaugh, Attorneys for
Objectors.

Please take notice that applicant will call up the foregoing motion before the Court at 10 a.m. May 11, 1954, at its courtroom in the Federal Building, at Juneau, Alaska.

May 10, 1954.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 10, 1954.

[Title of District Court and Cause.]

MOTION TO STRIKE

Applicant moves that the following portions of the printed record be stricken on the ground that the issues of fact sought by objectors to be proven therein are not issues upon which objectors theretofore had presented evidence to applicant's Board of Equalization, but had only made claims thereon, and therefore objectors had not exhausted their administrative remedy:

Pages 113 through 145 of the printed record, being:

Applicant's interrogatories filed June 21, 1949, and the objectors' answers thereto filed August 9, 1950; August 9, 1950; December 20, 1950.

Applicant's interrogatories filed December 20, 1950; and Objectors' answers dated December 20, 1950, and January 16, 1951.

And for the further ground that such evidence is an attempt to show a compromise out of Court.

May 12, 1954.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed May 12, 1954.

[Title of District Court and Cause.]

ORDER DENYING APPLICANT'S OBJECTIONS TO JUDGMENT ON MANDATE

Applicant's Objections to form of judgment on mandate presented by Objectors, after argument of counsel the Court took the matter under advisement, and now being fully advised in the premises:

It Is Ordered that said objections be and they are hereby overruled and that the costs taxed by the Appellate Court against the City Applicant cannot be applied or credited by the Applicant upon the

taxes, personal or realty, penalty and interest, or any part thereof, which Applicant claims are due to it from the Objectors.

Done in open Court this 12th day of May, 1954,
nunc pro tunc May 8, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed May 13, 1954.

[Title of District Court and Cause.]

OBJECTORS' OBJECTIONS TO NOTICE,
ALSO TO INTERROGATORIES, OF TAK-
ING THE DEPOSITION OF DOROTHY
HENRY

Objectors object to, and move to suppress, Applicant City's notice of the taking of the deposition of Dorothy Henry and to the written interrogatories proposed to be propounded to her upon the ground that the above-entitled Court has no jurisdiction to set, by its order of May 11, 1954, or otherwise, this proceeding for trial on June 24, 1954, or at any other time, and is without jurisdiction in this proceeding to permit further evidence to be adduced by the City through said witness, Dorothy Henry, or any other witness or in any other manner or to admit or receive any further evidence herein, and is without jurisdiction in this proceeding to do any

act or thing other than to obey the mandate and decision of the United States Court of Appeals for the Ninth Circuit, heretofore respectively issued and rendered herein, and that said order of May 11, 1954, violates, disregards, and disobeys said mandate and decision of said Appellate Court and said notice and interrogatories to said Dorothy Henry and her proposed deposition disregard and disobey said mandate and decision of said Appellate Court, and said interrogatories and the evidence sought to be elicited thereby are irrelevant, immaterial, and incompetent, and seek to amend, supplement, modify or qualify the delinquent tax roll which is the basis of this proceeding and which was before this Court when it made its Order of Sale on April 25, 1952, and before said Appellate Court when it rendered its said decision and issued its said mandate, and said evidence was before said Appellate Court when it rendered its said decision and issued its said mandate.

Dated at Juneau, Alaska, May 21, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed May 21, 1954.

[Title of District Court and Cause.]

NOTICE OF TAKING OF DEPOSITION ON
WRITTEN INTERROGATORIES

Please take notice that at 10 a.m. on May 24, 1954, at U. S. Commissioner's Office, Yakutat, Alaska, the above-named Applicant, City of Yakutat, will take the deposition of Dorothy Henry upon written interrogatories pursuant to the Rules of Civil Procedure, before U. S. Commissioner, a notary public, or before some officer authorized by law to take depositions. A copy of the direct interrogatories is attached. You are invited to propound cross-interrogatories.

Dated May 12, 1954.

/s/ WILLIAM L. PAUL, JR.,
Attorney for Applicant.

Copy received May 12, 1954.

Attorney for Objectors.

[Title of District Court and Cause.]

DEPOSITION OF DOROTHY HENRY

Be It Remembered, that on May 24, 1954, in Yakutat, Alaska, before me, ex officio a notary public in and for Territory of Alaska, duly commissioned and sworn, personally appeared the witness

hereinafter named, as a witness called herein on behalf of applicant, and gave answer to the interrogatories and cross-interrogatories hereto attached, as follows:

Direct Interrogatories to Be Propounded by Applicant to the Witness, Dorothy Henry, May 24, 1954.

1. State your name and official position with the City of Yakutat.

Answer: My name is Dorothy Henry. I am the city clerk for Yakutat.

2. Are you the person having official custody of the assessment rolls of the City of Yakutat?

Answer: Yes.

3. Attached hereto is a photostatic copy. Can you identify it? If so, please identify it.

Answer: The photostatic copy is a true copy of the assessment rolls of the City of Yakutat for the years inscribed thereon relating to the personal and real property of Libby, McNeill and Libby, and Yakutat and Southern Railway at Yakutat, Alaska. Combined with the assessment rolls is the tax roll showing the computation of tax at the appropriate millage rate.

/s/ DOROTHY B. HENRY.

(Signature of Witness.)

United States of America,
Territory of Alaska—ss.

I, the undersigned, a notary public duly appointed, commissioned and sworn to act in and for the above-entitled jurisdiction, do hereby certify that on the appearance date first above written and at the place thereof, before me personally appeared the hereinabove witness, as a witness hereinabove stated;

That thereupon said witness was sworn by me to tell the truth, the whole truth and nothing but the truth, and a true answer make to all interrogatories and cross-interrogatories propounded to said witness; that thereupon the foregoing interrogatories and cross-interrogatories were propounded to him by William L. Paul, Jr., as attorney for applicant, City of Yakutat, and
.....; and to which he then and there made his respective answers as set forth after each of said interrogatories; that thereafter he caused said answers to be reduced to writing, whereupon said witness read said interrogatories and his answers in my presence and made such corrections thereto as appear therein, and thereupon signed and swore said answers were true answers to said respective interrogatories;

That I further hereby certify that said answers to all interrogatories are a true record and transcript of the testimony given by said witness; that I am not an attorney or agent of any of the parties to the above-entitled suit or interested directly or

indirectly in the matter in controversy and am not financially interested in said action or the outcome thereof.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at the place in this certificate first mentioned on May 24, 1954.

[Seal] /s/ R. A. WELSH,
U. S. Commissioner for Precinct of Yakutat, Alaska,
and Ex Officio Notary Public for the Territory
of Alaska.

[Endorsed]: Filed May 25, 1954.

[Title of District Court and Cause.]

NOTICE OF FILING OF DEPOSITION
OF DOROTHY HENRY

To the Above-Named Objectors and Their Attorney,
R. E. Robertson:

You are hereby notified that the deposition of Dorothy Henry, on written interrogatories taken on behalf of applicant, City of Yakutat, on May 24, 1954, in Yakutat, Alaska, before U. S. Commissioner, has today been filed with the Clerk in the above cause.

Dated May 25, 1954.

/s/ WILLIAM L. PAUL, JR.,
Attorney for Applicant.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

In the District Court for the District of Alaska,
Division Number One, at Juneau

No. 6581-A

In the Matter of
The Delinquent Tax Roll of Real and Personal
Property for the City of Yakutat, Alaska, for
the years 1948 and 1949.

LIBBY, McNEILL & LIBBY, a Corporation, and
YAKUTAT & SOUTHERN RAILWAY, a
Corporation,

Objectors.

SUPPLEMENTAL TRANSCRIPT

[Title of District Court and Cause.]

ORDER SHORTENING TIME

This Court being about to depart from this Division sooner than applicant's motion to have this matter set for trial could regularly be heard, thus causing unnecessary delay in the Court's consideration of said motion and matter, it is

Ordered that the time within which to hear said motion be and hereby is shortened to 10 a.m. May 11, 1954.

It Is Further Ordered that said motion be and

hereby is allowed, and the time of trial of said matter is fixed at 10 a.m. June 24, 1954.

Done at Juneau, Alaska, this May 11, 1954.

GEO. W. FOLTA,
District Judge.

Copy received May 11, 1954, 4:10 p.m.

R. E. ROBERTSON,
Of Attorneys for Objectors.

[Title of District Court and Cause.]

MINUTE ENTRY OF JUNE 29, 1954

As entered in Journal No. 21, Page 475. This pertains to both No. 6581-A and No. 6734-A.

At this time these matters came before the court for hearing on Objections to Order of Sale in the above-entitled cases. William L. Paul, Jr., was present in behalf of Plaintiffs; R. E. Robertson for Objectors. After argument the Court directed that in Cause No. 6581-A evidence heretofore introduced in support of objections to the Tax Roll be considered in support of the objections to the present tax roll. Thereafter the Court signed Order of Sale in each case.

It was stipulated that the amount of the supersedeas bond in Cause No. 6581-A may be fixed at \$4,000 and in Cause No. 6734-A at \$6,000.00.

MINUTE ENTRY OF JULY 28, 1954

As entered in Journal No. 21, Page 496. This pertains to both Nos. 6581-A and 6734-A.

Objectors' Motion, on June 30, 1954, to amend or alter the Minute Order entered in Cause No. 6581-A on June 29, 1954, was allowed upon applicant's consent but subject to applicant's non-admission of any objectors' legal conclusions stated in this Objections in support of their Motion, dated June 23, 1954, to Strike Applicant's Amended Duplicate Delinquent Tax Roll for 1949, dated June 23, 1954, and without admitting the legal validity of those Objections.

Objectors' Motions for New Trial in both causes Nos. 6581-A and 6734-A, after argument of counsel, were denied.

Applicant's Application to withdraw its original municipal records on deposit with the Clerk of the Court was allowed upon applicant's agreement that it would promptly return into the custody of the Clerk such of those records as the objectors might request.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Territory of Alaska,
Division Number One—ss.

I, J. W. Leivers, Clerk of the District Court for the District of Alaska, Division Number One, do hereby certify that the hereto attached documents are true and correct copies of the Order Shortening Time of May 11, 1954, Minute Order of June 29, 1954, and Minute Order of June 28, 1954, in the above cause, the originals whereof were heretofore transmitted by me to the Honorable U. S. Court of Appeals for the Ninth Circuit in San Francisco and have not yet been returned to me, and are certified by me as a Supplemental Transcript at the request of Objectors Libby, McNeill & Libby and Yakutat & Southern Railway's counsel for inclusion in the record on appeal herein.

In Witness Whereof I have hereunto set my hand and affixed the seal of the above-entitled Court in Juneau, Alaska, this 25th day of January, 1955.

[Seal] /s/ J. W. LEIVERS,

Clerk of the District Court.

[Title of District Court and Cause.]

OBJECTORS' MOTION TO VACATE ORDER
ENTITLED "ORDER SHORTENING
TIME"

Objectors move to vacate and set aside that certain order, entered herein on May 11, 1954, entitled "Order Shortening Time," wherein, among other things, the trial of this proceeding was "fixed at 10 a.m. June 24, 1954," for the following, inter alia, grounds:

1. This Court is without jurisdiction to set this proceeding for trial on June 24, 1954, or for any other time.

2. This Court is without jurisdiction to admit, receive, or consider, or to permit the adducement of, any further evidence herein.

3. This Court is without jurisdiction herein to do any act or thing other than to obey the mandate of the United States Court of Appeals for the Ninth Circuit which was issued on August 19, 1953, which commanded this Court to do nothing other than to cause said mandate to be filed herein, to enter this Court's judgment on said mandate, and to tax costs against the applicant.

4. That the mandate of said Appellate Court, issued on August 19, 1953, and its decision by its opinion of July 8, 1953, and its order, entered on August 13, 1953, denying the Applicant's petition for rehearing are res judicata of the issues of this

proceeding and estop and bar the applicant from a further trial herein.

5. That this Court's judgment on the mandate, entered herein on May 8, 1954, is final, from which no appeal is allowable, and no further proceedings can be had herein other than to tax costs in this Court against Applicant and to enforce the costs, both of said Appellate Court and this Court, against Applicant.

6. That this Court's judgment on mandate, entered herein on May 8, 1954, is *res judicata* and estops and bars the Applicant from a further trial herein.

7. That this Court's said order of May 11, 1954, disregards and ignores said Appellate Court's mandate and decision and order denying Applicant's petition for rehearing before the Appellate Court, and a further trial herein will be in disregard of and in disobedience to **them**.

8. That this Court is without jurisdiction herein to grant the Applicant any further relief whatsoever, and that all of the issues of this proceeding have been decided adversely against the Applicant, i.e.: as to the tax year 1948 by this Court's decision and opinion filed herein on March 6, 1952, and its order of sale of April 25, 1952, and as to the tax year 1949 by the Appellate Court's decision and opinion, mandate, and order denying Applicant's petition for rehearing, whereupon this Court here-

tofore on May 8, 1954, entered its said judgment on mandate.

9. That if a new or further trial is had herein pursuant to this Court's order of May 11, 1954, or otherwise, these Objectors will be obliged to incur the useless expense of preparing for and adducing evidence at said trial and of again appealing to the Honorable United States Court of Appeals for the Ninth Circuit, should this Court at such trial grant Applicant's application for order of sale, notwithstanding that all of the issues of this proceeding have heretofore been adjudicated adversely to Applicant by said Appellate Court's decision and opinion, order denying Applicant's petition for rehearing, and mandate and by this Court's decision and opinion, order of sale, and judgment on mandate.

This motion is based upon the records and files herein and upon the decision and opinion, order denying petition for rehearing, and mandate of and the other proceedings on appeal before the United States Court of Appeals for the Ninth Circuit.

Dated at Juneau, Alaska, May 28, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Notice

To the City of Yakutat, Alaska, Applicant, and Its Attorney, William L. Paul, Jr.:

You are hereby notified that Objectors will present the foregoing Motion, together with their Objections to Notice, also to Interrogatories, of taking the deposition of Dorothy Henry, and their Objections to Applicant's Motion, dated May 12, 1954, to strike certain portions of the Printed Record on Appeal presented to the United States Court of Appeals for the Ninth Circuit, namely: Pages 113 through 114, Applicant's Interrogatories filed June 21, 1949, and Objectors' Answers thereto filed August 9, 1950; August 9, 1950; December 20, 1950, and Applicant's Interrogatories filed December 20, 1950, and Objectors' Answers dated December 20, 1950, and January 16, 1951, and also their Motion, dated May 28, 1954, to Suppress the Deposition of Dorothy Henry, to the Honorable George W. Folta, Judge of the above-entitled Court, in Anchorage, Alaska, at 10 a.m., June 4, 1954, or at 10 o'clock a.m. of the first day thereafter, not a legal holiday, on which he is in Anchorage, Alaska, either in Chambers or holding Court.

Dated at Juneau, Alaska, May 28, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

MOTION TO SUPPRESS DEPOSITION
OF DOROTHY HENRY

Objectors move to suppress the deposition of Dorothy Henry heretofore taken on May 24, 1954, before the U. S. Commissioner at Yakutat, Alaska, viz.:

1. Upon all of the grounds of all of the objections, set forth in Objectors' "Objections to Notice, also to Interrogatories, of taking the deposition of Dorothy Henry," which Objections were heretofore, prior to the taking of said deposition, served and filed herein, and which grounds by reference thereto are hereby made a part hereof.

2. Upon all of the grounds set forth in Objectors' "Motion to Vacate Order Entitled 'Order Shortening Time,' " which motion was heretofore or is now about to be served and filed herein and the grounds whereof by reference thereto are hereby made a part hereof.

3. Upon all of the grounds set forth in Objectors' "Objections to Applicant's Motion, dated May 12, 1954, to strike certain portions of the Printed Appeal Record presented to the United States Court of Appeals for the Ninth Circuit," which Objections were heretofore or are now about to be served and

filed herein and the grounds whereof by reference thereto are hereby made a part hereof.

4. The evidence adduced by said Deposition is not newly discovered evidence but was known to and could have been adduced, if material and relevant, by the Applicant at the trial before this Court in January, 1953; in fact, it was at least substantially before this Court at the trial in January, 1953, and before the United States Court of Appeals for the Ninth Circuit on the appeal to that Court by Objectors from this Court's order of sale of April 25, 1952; that said evidence presents no new or different issues of fact for the determination of this Court and, if it did, it cannot now be considered; in fact, it presents no issue of fact, and it disregards and ignores this Court's judgment on mandate entered herein on May 8, 1954, which is final and not appealable and also disregards, ignores, and seeks to alter, amend and modify said Appellate Court's decision and opinion of July 8, 1953; its order of August 13, 1953, denying Applicant's petition for rehearing, and its mandate of August 19, 1953, all of which were rendered, entered, or issued at a term of court of the Appellate Court which expired prior to October 1, 1953.

This motion is based upon the records and files herein and upon the decision and opinion, order denying petition for rehearing, and mandate of and the other proceedings on appeal before the United States Court of Appeals for the Ninth Circuit.

Dated at Juneau, Alaska, May 28, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

OBJECTORS' OBJECTIONS TO APPLI-
CANT'S MOTION, DATED MAY 12, 1954,
TO STRIKE PORTIONS OF THE
PRINTED APPEAL RECORD

Objectors object, upon the grounds hereinafter stated, to the granting of Applicant's Motion, dated May 12, 1954, to strike portions of the Printed Record on Appeal of the above proceedings to the United States Court of Appeals for the Ninth Circuit from the order of sale of this Court entered herein on April 25, 1952, which order of sale said Appellate Court heretofore reversed, i.e.:

1. Objectors by reference thereto hereby make as a part hereof all of the grounds contained in their "Objections (dated May 21, 1954) to Notice, also to Interrogatories, of Taking of the Deposition of Dorothy Henry," which Objections were heretofore served and filed herein.

2. Objectors by reference thereto hereby make as a part hereof all of the grounds contained in their "Motion (dated May 28, 1954) to Vacate Order 'Order Shortening Time,' " which said motion has been or is about to be served and filed herein.

3. This Court has no jurisdiction to grant said motion or to strike said or any portion of said record, and that the term at which the United States Court of Appeals for the Ninth Circuit issued on August 19, 1953, its mandate has expired, which Appellate Court had said record before it when it rendered its decision and opinion of July 8, 1953, and issued said mandate.

4. This Court has no jurisdiction to entertain, consider, or admit the alleged issue of fact that Objectors did not exhaust their administrative remedy before Applicant's Board of Equalization, or any other issue of fact on behalf of Applicant, and all such issues of fact, if ever relevant or material, were waived by Applicant's not urging them before either this Court at the trial hereof in January, 1953, or the Appellate Court upon the appeal before it, and, further, this Court in its opinion, filed March 6, 1952, decided that "in the absence of statutory authorization a municipality has no power to compromise a valid tax claim," but nonetheless said Appellate Court reversed this Court's order of April 25, 1952.

This motion is based upon the records and files herein and upon the decision and opinion, order

denying petition for rehearing, and mandate of and other proceedings on appeal before the United States Court of Appeals for the Ninth Circuit.

Dated at Juneau, Alaska, May 28, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed May 28, 1954.

[Title of District Court and Cause.]

OBJECTORS' AMENDED NOTICE OF PRESENTATION OF MOTION TO VACATE ORDER ENTITLED "ORDER SHORTENING TIME"; OBJECTIONS TO APPLICANT'S MOTION TO STRIKE CERTAIN PORTIONS OF THE PRINTED RECORD ON APPEAL; MOTION TO SUPPRESS DEPOSITION OF DOROTHY HENRY; AND OBJECTIONS TO NOTICE, ALSO TO INTERROGATORIES, OF TAKING DEPOSITION OF DOROTHY HENRY

To the City of Yakutat, Alaska, Applicant, and Its
Attorney William L. Paul, Jr.:

You are hereby notified that instead of presenting the foregoing matters as stated in Objectors' Notice of May 28, 1954, which was heretofore served upon you and filed in the above proceedings, that Objectors

will present their Motion to Vacate Order entitled "Order Shortening Time" and their Objections to Applicant's Motion to Strike certain portions of the Printed Record on Appeal, and their Motion to Suppress the Deposition of Dorothy Henry and their Objections to Applicant's Notice, also to Interrogatories, of taking Deposition of Dorothy Henry, to the Honorable George W. Folta, Judge of the above-entitled Court, at 10 a.m., June 4, 1954, in Anchorage, Alaska, but, if said Judge is not then in Anchorage, Objectors will present all of said matters at said time and place to the Honorable District Judge of the District Court for the District of Alaska who is then presiding in Anchorage, Alaska; provided, if District Judge Folta or any other District Judge of the District Court is presiding in Juneau, Alaska, at said time then said matters will be presented to him in Juneau, Alaska.

Dated at Juneau, Alaska, May 29, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed May 29, 1954.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE OF
AMENDED NOTICE

United States of America,
Territory of Alaska—ss.

Elliott Robertson, being first duly sworn on oath, deposes and says: On May 29, 1954, at about 11:15 a.m., I personally called at the office of William L. Paul, Jr., who is attorney for the Applicant, the City of Yakutat, Alaska, which office is situated in the Klein Building, on Franklin Street, in Juneau, Alaska, to serve upon him a copy of the hereinafter mentioned Amended Notice; that I found said office locked with no one in charge, and that I thereupon then and there served said Amended Notice upon said William L. Paul, Jr., by inserting under the front door of said office and leaving in said office a true copy of Objectors' Amended Notice of Presentation of Motion to Vacate Order Entitled "Order Shortening Time"; Objections to Applicant's Motion to Strike Certain Portions of the Printed Record on Appeal; Motion to Suppress Deposition of Dorothy Henry; and Objections to Notice, also to Interrogatories, of Taking Deposition of Dorothy Henry, and filed the original of said Amended Notice with the Clerk of the above-entitled Court, which Original Amended Notice by reference thereto is hereby made a part of this affidavit.

/s/ ELLIOTT ROBERTSON.

Subscribed and Sworn to before me in Juneau, Alaska, this 1st day of June, 1954.

[Seal] /s/ R. E. ROBERTSON,
Notary Public for Alaska.

My commission expires June 24, 1957.

Receipt of copy acknowledged.

[Endorsed]: Filed June 1, 1954.

[Title of District Court and Cause.]

OBJECTORS' SECOND AMENDED NOTICE
OF PRESENTATION OF MOTION TO
VACATE ORDER ENTITLED "ORDER
SHORTENING TIME"; OBJECTIONS TO
APPLICANT'S MOTION TO STRIKE CER-
TAIN PORTIONS OF THE PRINTED REC-
ORD ON APPEAL; MOTION TO SUP-
PRESS DEPOSITION OF DOROTHY
HENRY; AND OBJECTIONS TO NOTICE,
ALSO TO INTERROGATORIES, OF TAK-
ING DEPOSITION OF DOROTHY HENRY

To the City of Yakutat, Alaska, Applicant, and Its
Attorney William L. Paul, Jr.:

Referring to Objectors' Notice of May 28, 1954,
and Amended Notice of May 29, 1954, heretofore
served upon you and filed, and to its attorney R. E.
Robertson's letter to you of June 2, 1954, stating
that

“Having been informed that neither Judge Folta nor Judge McCarrey are now in Anchorage, and that no Court will be held there until June 14, 1954, and that Judge Pratt will not hear motions in the District Court in Fairbanks prior to the 11th inst.: I will not present the Objectors’ various Motions and Objections on behalf of Objectors, which I heretofore served upon you, on the 4th inst. in Anchorage, and as stated in Objectors’ Notice of May 28, 1954, and their Amended Notice of May 29, 1954, but I will later further notify you by Amended Notice of the time and place when and where those motions and Objections will be presented to the District Court.”

of which letter you acknowledged receipt on June 2, 1954, You Are Hereby Notified that Objectors will present their Motion to Vacate Order entitled “Order Shortening Time” and their Objections to Applicant’s Motion to Strike certain portions of the Printed Record on Appeal, and their Motion to Suppress the Deposition of Dorothy Henry, and their Objections to Applicant’s Notice, also to Interrogatories, of taking Deposition of Dorothy Henry, to the Honorable George W. Folta, Judge of the above-entitled Court, either in open Court or in Chambers, at 10 a.m., June 10, 1954, in Anchorage, Alaska, or as soon thereafter as he is in Anchorage, Alaska; but if Judge Folta is not in Anchorage, Alaska, on June 10, 1954, the Objectors will present all of said matters to such District Judge of the

District Court as is first available on or after 10 a.m., June 10, 1954, in Anchorage, Alaska.

Dated at Juneau, Alaska, June 4, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

[Endorsed]: Filed June 4, 1954.

[Title of District Court and Cause.]

MINUTE ORDER OF JUNE 11, 1954

Hearing on Objector's Motion To Vacate Order
Entitled "Order Shortening Time"

Now at this time hearing on objector's motion to vacate order entitled "Order Shortening Time" in cause No. 6581-A, entitled In the Matter of the Delinquent and Supplemental Delinquent Tax Roll of Real and Personal Property for the City of Yakutat, Alaska, for the years 1948 and 1949, came on regularly before the Court, the objectors not being present but represented by Raymond E. Plummer, of their counsel, appearing for R. E. Robertson, Juneau, Alaska, attorney of record.

Argument to the Court was had by Raymond E. Plummer, for and in behalf of the objectors.

Whereupon the Court having heard the argument of counsel and being fully and duly advised in the premises, announced it would reserve its decision.

[Title of District Court and Cause.]

MINUTE ORDER OF JUNE 12, 1954

Decision on Objector's Motion to Vacate Order
Entitled "Order Shortening Time"

Argument having been had heretofore and on the 11th day of June, 1954, and decision reserved in cause No. 6581-A, entitled In the Matter of the Delinquent and Supplemental Delinquent Tax Roll of Real and Personal Property for the City of Yakutat, Alaska, for the years 1948 and 1949, and decision reserved,

Whereupon court now renders decision "The objector's several motions are denied without prejudice to a renewal thereof upon the failure of the applicant to present a new duplicate delinquent tax roll on or before June 24."

(Raymond E. Plummer, appearing for R. E. Robertson, notified by phone this date.)

[Title of District Court and Cause.]

DEMAND FOR PRODUCTION OF RECORD,
ORDINANCES, RESOLUTIONS, ORIGINAL
DELINQUENT TAX ROLLS AND
OTHER DOCUMENTS AND PAPERS

To the Applicant City of Yakutat and Its Attorney
Wm. L. Paul, Jr.:

Without prejudice to Objectors' contention that the above-entitled Court is without authority or

jurisdiction to try the above proceedings on June 24, 1954, or at any other time, and without in any wise consenting to such or any trial thereof, Objectors make demand upon you that you produce at said trial on June 24, 1954, or at such other time as such trial may be had, should the above Court over and against Objectors' consent and objections hold another or further trial of said proceedings at said or any other time, all of the City of Yakutat's records, ordinances, resolutions, books, tax assessment lists, original delinquent tax rolls, minutes of Board of Trustees and of Board of Equalization, tax notices, receipts, letters, and all other papers or documents that in any manner pertain to or have a bearing upon or that control, govern or affect the assessment and levy of municipal taxes and the equalization thereof or that show any acts or procedure taken by the City of Yakutat or its Board of Trustees, its City Clerk, its Assessor, or by any other city officer or agent in connection with or in assessing, levying, imposing, or enforcing collection of, general municipal taxes for the municipal tax years of 1948 and 1949.

Dated at Juneau, Alaska, this 19th day of June, 1954.

ROBERTSON, MONAGLE &
EASTAUGH,

By /s/ R. E. ROBERTSON,
Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed June 21, 1954.

[Title of District Court and Cause.]

RESPONSE AND OBJECTIONS
TO DEMAND

United States of America,
Territory of Alaska—ss.

William L. Paul, Jr., of Juneau, Alaska, being first duly sworn, on oath deposes and says that he is municipal attorney for applicant and makes this response for applicant to Objectors' demand of June 21, 1954.

This demand was received by affiant at 3:35 p.m. June 21, 1954. I am also attorney of record herein and therefore know that no such demand has otherwise been received by applicant.

I have telegraphed for the papers demanded. They may arrive but I cannot be sure of that expectation because of uncertain radio conditions, weather conditions, plane schedules, and the press of business of other of applicant's officials who have actual custody of supplementing records.

I have already delivered to the Clerk of the Court all the records of applicant demanded that I have but they are not complete.

The next transportation scheduled to arrive in Juneau from Yakutat is at about 5 p.m. June 23, via Pacific Northern Airways. I don't expect, assuming the best possible conditions, to be able to complete the filing of such records until early on June 24, and cannot engage to do so in view of the lateness and untimeliness of this demand.

Furthermore, affiant believes that the Objectors have already substantially all of the records demanded in cause No. 6734-A and this cause between the same parties and involving the same issues, and the material evidence is already before the Court in such causes insofar as the Objectors have desired or required of applicant.

This is a partial new trial and no new evidence than is already in the official in either cause is to be adduced than what the parties could have had many months ago.

Objector's demand makes no showing to excuse the lateness of the demand, and if the applicant cannot supply the documents demanded, no postponement of the trial of this cause should be granted.

There is no showing of the necessity for such demanded documents made in such demand, nor apparent from the record of either cause, even though Objectors have had complete access to such records between 6 months and 2 years ago.

This is made on the files and records of this cause and cause No. 6734-A, of which latter the applicant hereby asks that the Court take Judicial Notice.

/s/ WILLIAM L. PAUL, JR.

Subscribed and sworn to before me this June 22, 1954.

[Seal] /s/ JOHN H. DIMOND,

Notary Public for Alaska.

My commission expires October 5, 1956.

Receipt of copy acknowledged.

[Endorsed]: Filed June 22, 1954.

[Title of District Court and Cause.]

AMENDED SUPPLEMENTAL DELINQUENT
TAX ROLL FOR 1949

Comes now Applicant to present its amended supplemental duplicate tax roll for delinquent taxes for 1949:

Description of Property and to whom Assessed:

Real property located on U. S. Survey No. 2881 (Alaska) owned by and assessed to Libby, McNeill & Libby and Yakutat & Southern Railway

Amount of Assessment: \$193,695.00

Tax rate: 13 mills

Amount of delinquent taxes: \$1,988.29

Penalty: \$198.83

Interest at 1% monthly since December 12, 1949, to June 24, 1954: \$1,181.04

Total of tax, penalty and interest: \$3,368.16

Certificate

I, Dorothy Henry, Clerk of the City of Yakutat, Alaska, do hereby certify that the foregoing is a true and correct amended supplemental roll of the delinquent real property taxes of the said City, for the municipal tax year of 1949; and that all of said taxes are due and became due on December 15, 1949; that the total amount of delinquent taxes, penalty

and interest together with the aggregate of the whole thereof assessed against each separate tract are due and delinquent and are shown on the foregoing roll.

During the time of publication and notice and up to the order of sale requested, any person may appear and make payment on any piece or tract of property set forth herein of said taxes, penalty and interest, and the clerk or other officer shall make proper notice of such payment on both the original and duplicate and amended supplemental tax rolls.

In Witness Whereof I have hereunto set my hand and the corporate seal of the City of Yakutat, Alaska, this June 23, 1954.

DOROTHY HENRY,
Clerk.

By /s/ WILLIAM L. PAUL, JR.,
Municipal Attorney.

/s/ WILLIAM L. PAUL, JR.,
Attorney for Applicant.

Receipt of copy acknowledged.

[Endorsed]: Filed June 23, 1954.

[Title of District Court and Cause.]

OBJECTORS' RENEWAL OF:

1. MOTION TO VACATE ORDER SHORTENING TIME, WHICH INCLUDED AN ORDER SETTING THIS PROCEEDINGS FOR TRIAL AT THIS TIME;
2. MOTION TO SUPPRESS DOROTHY HENRY'S DEPOSITION;
3. OBJECTIONS TO THE TAKING OF DOROTHY HENRY'S DEPOSITION; and
4. OBJECTIONS TO APPLICANT'S MOTION TO STRIKE CERTAIN PORTIONS OF THE PRINTED RECORD ON APPEAL

Objectors renew their motions and objections, which were presented on their behalf by Attorney Raymond E. Plummer to the Court in Anchorage on June 11, 1954, resulting in the Court's entering a minute order on June 12, 1954, substantially:

"The Objectors' several motions are denied without prejudice to a renewal thereof upon failure of the applicant to present a new duplicate delinquent tax roll on or before June 24."

Applicant has not to Objectors' knowledge presented a new duplicate delinquent tax roll.

Objectors continue to and do again renew all of the points and objections made in those Motions and Objections and in the Memorandum of Authorities and Written Argument presented to the Court by Mr. Plummer, and contend that this Court has no

authority or jurisdiction to hold any new or further trial on this proceedings.

Even if a new duplicate delinquent tax roll is or was presented, Objectors further contend that before this Court could hold a hearing thereon all the statutory jurisdictional steps would have to be taken; nor do they presently concede that the statute authorizes a new or amended duplicate delinquent tax roll for municipal taxes for either the years 1948 or 1949.

At the hearing on the Motions and Objections in Anchorage on June 11, 1954, the Court said to Mr. Plummer: "Why can't they start with a new delinquent tax roll if in fact the tax records of the City are in such shape that a new delinquent tax roll, showing either only the real property or showing the segregation of both, can be prepared? In other words, what authority is there that requires the City of Yakutat now to start over again? That is what I am interested in. * * * That is why I inquired whether there are authorities that would seem to require that this proceeding be begun anew. It is difficult for me to believe that there could be any such authorities."

While so far as Objectors can ascertain this particular point as to the particular statutes involved has not been decided by any Alaskan Court, however Objectors reiterate as stated on page 1 of their Written Argument:

"The delinquent tax roll is the sole pleading or document upon which the municipality's

application to enforce the tax lien by sale of the realty is founded. The entire proceedings is conditioned upon the delinquent tax roll."

and on page 2 thereof:

"The duplicate delinquent tax roll that is presented to the Court is the controlling document, not the one on file with the city clerk. Sec. 16-1-124, provides: 'Clerk to correct original delinquent tax roll and sell property. The clerk of the City shall immediately after the order of sale correct the original delinquent tax roll to correspond in all respects with the delinquent tax roll as passed upon and allowed by the court.' "

and on page 6 thereof:

"The delinquent tax roll has been presented both this and the Appellate Court, and the latter court has held that under it no order of sale can be entered by this court. Nothing further remains to be tried or decided. The judgment upon the mandate is a final order or judgment, other than it is not appealable because second appeals are not allowable, just as this Court's order of sale of April 25, 1952, was final until the Appellate Court reversed it and just as this Court's order denying the sale would have been had this Court, at the conclusion of the trial before it, properly entered an order on April 25, 1952, denying the application to sell."

Generally speaking the situation to us seems somewhat analogous to a foreclosure action where a judgment has been rendered on a mortgage describing the property as Tract A and in which service was necessarily obtained by publication of summons, which judgment was reversed upon appeal because the evidence actually showed that the mortgage was on Tract B. It scarcely seems possible that the mortgagor could then come into court in the same action and without publication of a new summons move the court to proceed to a hearing on a mortgage that correctly described the property as Tract B.

Regardless of the aptness or inaptness of the example, Objectors submit that a new or further trial in this proceedings even upon a new delinquent tax roll cannot be held without first complying with the statutory provisions of Sections 16-1-121 through 130, ACLA 1949, as to the preparation, certification, authorization, presentment, notice, and application for an order of sale upon such new delinquent tax roll.

Objectors also submit that the present duplicate delinquent tax roll cannot be amended or enlarged in any manner by aliunde evidence, such as Dorothy Henry's deposition or otherwise.

No Statutory Authority Exists to Amend the or Present a New Duplicate Delinquent Tax Roll or to Amend or Enlarge It by Aliunde Evidence.

The common definition of an assessment or tax roll or list is:

“While it seems that a paper or warrant containing a tax against a single place only may be regarded as a ‘tax list’ within the meaning of certain statutes, an assessment or tax roll or list appears ordinarily to be a completed record for the year of all the taxable persons and property within the tax district, so arranged and itemized as to show to each taxpayer who may examine it exactly what property he is assessed on and the amount of tax he is required to pay thereon, although it may perform other functions.”

84 CJS 888, § 454.

“An assessment list or roll can be made with proper legal effect only by the particular board or officer designated by statute.”

Ibid, Sec. 455, p. 888.

Objectors submit no distinction exists between adding omitted property to a delinquent tax roll than to offer evidence to show that real and personal property taxes, instead of being lumped, were assessed separately and segregated.

An assessor may not add omitted property to the assessment roll unless authorized by statute.

Ibid, p. 957, § 508.

The duplicate delinquent tax roll in question here shows that both real and personal property were assessed, but that they were not segregated or separately assessed; hence, the Appellate Court set aside this Court’s Order of Sale of April 25, 1952.

The rule is in order to sustain an addition of property by tax assessors as omitted, it must appear that the items added were not assessed in the original assessment.

Ibid, p. 959, § 508.

Even where reviewing boards or officers are authorized by statute to make corrections in the assessment roll, they must do so strictly in accordance with the statutory provisions.

Ibid, p. 998, § 520.

Here there is no statutory authority for any one to make any corrections in the duplicate delinquent tax roll.

This same principle is also laid down in

Ibid, p. 1002, § 521.

and in

Ibid, p. 1006, § 522.

Section 16-1-122, ACLA 1949, specifically provides what shall be contained in the delinquent tax roll, viz.:

“Such roll shall show therein the property assessed, the amount of the tax due, penalty and interest, separately stated on each tract assessed, to whom each tract is assessed, if assessed as unknown, so stated.”

The facts stated in the roll are conclusive. Dorothy Henry's deposition seeks to establish other facts and to impeach the roll.

“Extrinsic evidence is not admissible to establish facts which can be evidenced only by the assessment roll.”

84 CJS, p. 922, § 485.

She has no statutory authority to correct any error in the roll by showing what the Applicant now claims is the correct amount of taxes that should have been assessed against the real property only.

Ibid, § 520, p. 998, *supra*.

“The necessity, sufficiency, correction, and preparation of duplicate lists or rolls depend on statutory provisions.”

Ibid, § 842, p. 920.

“Tax records and documents are commonly considered conclusive and not subject to impeach by parol evidence.”

32 CJS, p. 806, § 883.

Affidavit of Service of notice to redeem from tax sale cannot be aided by parol.

Geil v. Babb,

242 NW (Iowa) 34.

Assessment roll. Insufficient description of land on assessment roll cannot be aided by extrinsic evidence, and name listed under heading of “owner” cannot aid description.

Ransom v. Young,

168 So. (Miss.) 473.

Plat book of an assessor cannot be impeached or varied by parol evidence as to the description of land.

Blayden v. Morris,
214 P. (Idaho) 1039.

Record of board of assessors, which is duly kept pursuant to statutory requirement, generally cannot be varied or added to by other evidence.

Carbone, Inc., v. Kelly,
194 N.E. (Mass.) 701.

Records of county commissioners as to whether a tract of land is seated or unseated and has been assessed, taxed, and sold by the treasurer cannot be varied by parol testimony or by the private record of an assessor.

McCall v. Lorimer,
Pa. 4 Watts 351.

See also:

Trustees of St. Paul Methodist Episcopal
Church South v. District of Columbia, 212
F. 2d 244;

Tumulty v. District of Columbia,
1949, 69 App. D.C. 390, 400, 102 F. 2d 254,
264;

Atchison, T. & S. F. Ry. Co. v. Elephant
Butte Irr. Dist., 10 Cir. 1940, 110 F. 2d
767, 773;

Cooley, Taxation,
Vol. 3 (4th Ed. 1924), 1046.

Since writing the foregoing paper, the City at 2:45 p.m. this day served upon Objectors a purported Amended Supplemental Delinquent tax roll for 1949. Objectors will move to strike it on all the grounds stated in its aforesaid motions and objections, memorandum of authorities, and written argument, and are filing a motion to strike it.

Dated at Juneau, Alaska, June 23, 1954.

/s/ R. E. ROBERTSON,
Of Attorneys for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed June 24, 1954.

[Title of District Court and Cause.]

MOTION TO STRIKE "AMENDED SUPPLEMENTAL DELINQUENT TAX ROLL FOR 1949"

Objectors move to strike Applicant's "Amended Supplemental Delinquent Tax Roll for 1949," because it was not prepared, presented, authorized, or noticed in accordance to, nor in any manner complies with the statutory provisions of Sections 16-1-121 through 130, ACLA 1949, or Applicant's tax ordinances, nor is it a new duplicate delinquent tax roll for 1949 in any manner conforming with either said statutes or ordinances, nor has any notice been published or posted for any period of time whatsoever of its presentation to this court nor any application been filed for an order of sale thereon, and William L. Paul, Jr., neither as mu-

municipal attorney nor otherwise, has any authority under said statutes or ordinances, or otherwise, to prepare, present, or sign it, and the tax ordinances of Applicant contain no provision for the assessment of 1% or any other interest upon the claimed or any alleged delinquent taxes, and that this Court is without authority or jurisdiction to entertain or consider said purported "Amended Supplemental Delinquent Tax Roll for 1949" or to permit in any manner either by aliunde evidence or otherwise the amendment or modification of that certain duplicate delinquent tax roll for 1949 that was before this Court when it entered its order of sale of April 25, 1952, and which was before the Appellate Court on the appeal thereto from said order.

Dated at Juneau, Alaska, June 23, 1954.

/s/ R. E. ROBERTSON,

Of Attorneys for Objectors.

Objectors' Motion to Strike Amended Supplemental Tax Roll

Objectors also move to strike on the further grounds:

1. Neither Sec. 16-1-122, ACLA 1949, nor any other statute authorizes or empowers The City or its Board of Trustees to make up or present an amended supplemental tax roll.

2. The city's Tax Ordinances do not provide that the Clerk or any other official shall make up or present an amended supplemental tax roll for 1949 or any other year.

3. Neither Sec. 16-1-122, ACLA 1949, nor any other statute authorizes or empowers the City of Yakutat to make up or present an amended supplemental tax roll for any tax year after the duplicate delinquent tax roll for that year has been made up and presented to this Court with an application for order of sale.

4. Neither Sec. 16-1-122, ACLA 1949, nor any other statute authorizes or empowers the City of Yakutat to present to the Court for an order of sale an application, as in this proceeding, which application was made more than 3 years prior to the making of this purported amended supplemental tax roll, whose purported taxes, penalty and interest are sought to be made a lien upon real property.

5. The City's corporate seal is not affixed to the purported amended supplemental tax roll nor is it endorsed under the hand of the Clerk of the Court.

6. The original of the purported amended supplemental tax roll has not been filed and is not on file with the municipal clerk.

7. No proof has been made of either publishing or posting any notice of application to this Court of an order of sale on the purported amended supplemental tax roll.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed June 24, 1954.

[Title of District Court and Cause.]

MEMORANDUM DECISION

William L. Paul Jr., attorney for applicant.

R. E. Robertson, attorney for objectors.

The principal question now presented in this protracted litigation is whether, upon the reversal of this Court's Order of Sale, 206 F. 2d 612, because of the failure of the City to segregate the real from the personal property, the City must start anew and take all the steps set forth in Secs. 16-1-122, A.C.L.A. 1949, et seq., in regard to the preparation and presentation of a new tax roll, or whether it may present an amended roll on the basis of the record as heretofore made.

An Order of Sale has already been entered as to all property listed in the roll save that of the objectors. The Court expressed the opinion that the roll, found deficient in the respect pointed out by the Court of Appeals, could not be amended and that a new proceeding would have to be initiated, but upon further consideration I am inclined to accept the view urged by the City, principally because no useful purpose could be served by requiring the City to duplicate everything it has already done up to the presentation of the roll. The only property now involved is that of the objectors. Every possible objection available at every step of the proceeding has been made and disposed of. The only purpose that the objectors could now have in urging that the City be required to retrace its steps is to

further delay and impede the City in its effort to collect these taxes.

In this situation I am inclined to hold that, even though the procedure now adopted by the City may be somewhat irregular, it is nevertheless within the meaning of "subsequent proceedings," as that term is used in Sec. 16-1-124 that "no objection to the valuation of the property, the manner of the assessment and levy of the tax, or any of the 'subsequent proceedings' shall be entertained by the Court which does not affect the substantial rights of the parties interposing the objection." Moreover, this procedure would appear to be in the interest of justice.

Hence, I conclude that in the circumstances of this case the City may resume its effort to collect these taxes by presenting a new or amended tax roll on the basis of the record as made.

I am also of the opinion that evidence in support of the objection that the properties have been overvalued is not admissible here because it was not presented to the Board of Equalization.

It follows that the several motions of the objectors should be denied and that the application for an Order of Sale of the objectors' property should be granted.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed June 25, 1954.

[Title of District Court and Cause.]

OBJECTIONS TO ORDER OF SALE

Objectors hereby object to the entry of the Order of Sale, which was served upon them on June 26, 1954, because the entry thereof is an abuse of discretion by this Court particularly in that on June 24, 1954, the only matters heard were Objectors' Motion to Vacate the "Order Shortening Time" of May 11, 1954; their Motion to Suppress Dorothy Henry's deposition; their Motion to Strike Applicant's purported Amended Supplemental Duplicate Delinquent Tax Roll of 1949; their Objections to the taking of and to the direct interrogatories propounded in Dorothy Henry's deposition; and their Objections to Applicant's Motion to Strike certain portions of the Printed Record on Appeal, and, further, in that on June 24, 1954, in open Court Objectors stated that should the Court deny their said Motions, they required time to obtain their evidence, including witnesses to prove that the City's official tax records and ordinances, which then were and now are in the custody of the Clerk of this Court, show that the City had not complied in this proceeding with the statutory provisions of Section 16-1-121 through 130, ACLA 1949, and in that the Objectors have not been afforded an opportunity to make any defense to Applicant's purported Amended Supplemental Duplicate Delinquent Tax Roll for 1949.

Objectors further object upon the ground that said Order of Sale is based upon aliunde evidence,

viz.: Dorothy Henry's deposition that modifies, amends, or impeaches the Duplicate Delinquent Tax Roll for 1949 upon which the Application of January 3, 1951, for Order of Sale is based, and said Order of Sale is based upon a pretended new defense, which, if valid, was waived by Applicant's not presenting it at the hearing of these proceedings in January, 1952, i.e., that evidence of over-valuation of Objectors' property is not admissible because Applicant contends that such over-valuation was not presented to Applicant's Board of Equalization.

Objectors further object upon the grounds, viz.:

1. This Court is bound by the rule of law laid down by the United States Court of Appeals for the Ninth Circuit on the appeal to it from the Order of Sale entered by this Court on April 25, 1952, which is reported in 206 F. 2d 612, and whose opinion and mandate are res judicata herein, and this Court has no authority or jurisdiction to enter or allow said order.

2. Said Order is contrary to the law and to the evidence and entirely ignores the fact that the preponderance of the evidence showed that the assessments for each year were over-valued and over-assessed, and disregards the fact that the evidence proved that the actual value of the various properties during the two years were as claimed by objectors, and disregards the fact that for neither said years were any of said taxes fairly assessed or equalized.

3. Said Order is based either upon a duplicate delinquent tax roll which did not show and separately state and show the amount of taxes, penalty and interest due upon realty alone and lumped and stated in a single amount the taxes upon realty and personalty, and is based upon incompetent, aliunde evidence of Dorothy Henry that impeaches it, or upon a purported Amended Supplemental Duplicate Delinquent Tax Roll for 1949 which is invalid as stated in Objectors' Motion to Strike it, dated June 23, 1954, which by reference thereto is incorporated herein.

4. Said Order imposes upon Objector Yakutat & Southern Railway's real property a lien for interest of 1% per month from December 15, 1949, to date upon the sum of \$1,988.29, whereas Applicant's tax Ordinances 1, 2 and 4, which by reference thereto are incorporated herein and which are now in the custody of this Clerk, and particularly Ordinance 1, enacted July 3, 1948, and Ordinance 2, enacted September 4, 1948, and which were in effect during the tax year 1949 did not and do not now provide or fix any rate of interest to be paid upon either delinquent taxes or penalties thereon.

5. Under said Order Applicant has applied \$1,751.75, paid by Objectors Libby, McNeill & Libby and Yakutat & Southern Railway for 1949 contrary to the respective Objectors' instructions as to the payment of those sums and the application thereof, and which sums the Applicant retained and has not returned to Objectors.

6. Said Order imposes a lien upon Objector Yakutat & Southern Railway's real property for attorney's fees of \$748.06 whereas neither Sections 16-1-121 through 130, ACLA 1949, nor any other statute authorizes an attorney's fee to be taxed as costs in these proceedings, or to make it a lien upon said Objectors' real property, and that the allowance of any of said attorney's fees is contrary to the provisions of the United States Constitution and particularly to the Fifth and Fourteenth Amendments, and constitutes a deprivation of said Objectors' real property without due process of law or just compensation.

Dated at Juneau, Alaska, June 28, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Receipt of copy acknowledged.

[Endorsed]: Filed June 28, 1954.

In the District Court for the Territory of Alaska,
Division Number One, at Juneau

No. 6581-A

In the Matter of:

THE DELINQUENT AND SUPPLEMENTAAL
DELINQUENT TAX ROLL OF REAL
AND PERSONAL PROPERTY FOR THE
CITY OF YAKUTAT, ALASKA, FOR THE
YEARS 1948 AND 1949.

LIBBY, McNEILL & LIBBY, a Corporation, and
YAKUTAT & SOUTHERN RAILWAY, a
Corporation,

Objectors.

ORDER OF SALE

The application of the City of Yakutat with amended supplemental delinquent tax roll for 1949 and the Objectors' objections having come on regularly for hearing, the parties appearing by their attorneys, William L. Paul, Jr., for applicant, and R. E. Robertson for Objectors; and the Court having considered the admissible evidence adduced by the parties on the previous trial and the evidence adduced at this hearing, and having considered the arguments of counsel; and being fully advised in the premises, it is

Ordered, Decreed and Adjudged that Objectors are delinquent for a balance due of real property taxes in the sum of \$1,988.29 since December 15, 1949, plus penalty of 12% thereon, plus interest on

such delinquent tax at the rate of 1% monthly, assessed against real property of Objectors, being that embraced by United States Survey No. 1758 (Alaska), also known as Survey No. 2881 (Alaska); that said property be sold for the payment of the aforesaid sums, including costs of this hearing, including an attorney's fee to applicant of \$748.06 as for contested lien cases, according to local rule No. 45, said costs to be taxed by the Clerk of this Court; against which sums Objectors shall have a credit, \$719.94, for costs taxed on the Objectors' appeal to the Court of Appeal; said sale to be at a time certain as fixed by applicant within 60 days in the manner prescribed by law.

Done at Juneau, Alaska, this June 29, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

Copy received June 26, 1954.

I object to the entry of this order until I have time to present proper objections to it.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

[Endorsed]: Filed and entered June 29, 1954.

[Title of District Court and Cause.]

MOTION TO AMEND OR
ALTER MINUTE ORDER

Defendants move to alter or amend the minute order entered on June 29, 1954, to also show that in this cause the objections stated in Defendants' Motion, dated June 23, 1954, to Strike Applicant's Amended Duplicate Delinquent Tax Roll for 1949, dated June 23, 1954, were correct in fact, but that Applicant did not admit their validity.

Dated at Juneau, Alaska, June 30, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

Affidavit of mail attached.

[Endorsed]: Filed July 1, 1954.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Defendants move for a new trial because of abuse of discretion exercised and errors committed by the Court in the conduct of these proceedings all of which appear in the dockets, files, and record of this cause, and all of which are incorporated herein by reference to said dockets, files and record, and in ignoring the provisions of Section 16-1-121 through 131, ACLA 1949, whereby these proceedings are governed, and in not construing those statutes

in favor of Objectors and against the Applicant but to the contrary in all instances either ignoring those statutes or construing them in favor of the Applicant and against the Objectors, and in denying and overruling Objectors' Motion, dated May 28, 1954, to Vacate Order, dated May 11, 1954, entitled "Order Shortening Time"; Motion, dated May 28, 1954, to Strike Dorothy Henry Deposition; Motion, dated June 23, 1954, to Strike "Amended Supplemental Delinquent Tax Roll for 1949"; and Objectors' Renewal, dated June 23, 1954, of their said two Motions of May 28, 1954, and of their herein-after mentioned Objections of May 21 and 28, 1954; and Objectors' Objections of January 8, 1952, Supplemental Objections of January 8, 1952, Further Amendatory and Supplemental Objections of January 18, 1952; Objections, dated May 21, 1954, to Notice also to Interrogatories, to taking the Deposition of Dorothy Henry; Objections, dated May 28, 1954, to Applicant's Motion to Strike portions of the Printed Record on Appeal; and Objections, dated June 28, 1954, to Order of Sale; and in not abiding by the principal of law announced by the Honorable United States Court of Appeals for the Ninth Circuit in *Libby, McNeill & Libby, et al., v. The City of Yakutat, Alaska*, 206 F. 2d 612, whose opinion and mandate therein are res judicata herein, and constituted a final termination of this proceedings and this Court was without authority to do anything further herein than to file and enter said mandate of the Appellate Court and this Court's judgment on said mandate and to tax costs against

the Applicant, but to the contrary, this Court in entering said Order of Sale considered Applicant's pretended Amended Supplemental Duplicate Delinquent Tax Roll, which was not prepared, authorized, or presented in accordance either with any of the provisions of Sections 16-1-121 through 131, ACLA 1949, or with any of the provisions of Applicant's Tax Ordinances 1, 2 and 4, and admitted and considered the incompetent, aliunde evidence of Dorothy Henry by deposition not only in proof and support of said Amended Supplemental Duplicate Delinquent Tax Roll but also to amend, alter, and modify the Duplicate Delinquent Tax Roll that was presented to this Court by Applicant's Application of January 3, 1951, and also permitted Applicant to raise the issue, which had been waived by Applicant's not raising it at the hearing of this proceeding in January, 1952, that Objectors' claim of over-valuation and over-assessment of their properties was not admissible because not presented to Applicant's Board of Equalization, and this Court received, considered and based in whole or in part its Order of Sale of June 29, 1954, upon said issue notwithstanding it was irrelevant, immaterial, and contrary to the law and the evidence, and disregards the duty of the Court imposed upon it by Sec. 16-1-124, ACLA 1949, to adjust on equitable principles the over-valuations and over-assessments of Objectors' property, and particularly of Objector Yakutat & Southern Railway's real property and by its Order of Sale of June 29, 1954, creating a lien upon Objector Yakutat & Southern

Railway's real property for interest at 1% monthly, as stated in said Order of Sale, notwithstanding that Applicant's Tax Ordinances do not provide or fix any rate of interest against delinquent taxes, and also for an attorney's fee of \$748.06, all without due process of law and without just compensation, contrary to the Constitution of the United States, and particularly to the Fifth and Fourteenth Amendments thereof, and which Order of Sale is the result of the Court's placing throughout these proceedings the burden upon the Objectors instead of upon the Applicant without construing said statutes and any doubts of the construction of or ambiguities in them in favor of the Objectors, and ignoring the evidence that the Applicant's assessments are not actual values but are over-valuations and over-assessments made by Applicant in bad faith, and ignoring the evidence that Applicant applied, without authority of law and against Objectors' consent and contrary to their written instructions, monies paid by them in full payment of all taxes for the year 1949 upon their respective properties at their actual values, first upon personal property taxes thereby leaving purported unpaid taxes upon Objector Yakutat & Southern Railway's real property which is to be sold under said Order, which is contrary to the law and the evidence, regardless of whether based in whole or in part upon either or both the Duplicate Delinquent Tax Roll presented with Applicant's Application of January 3, 1951 (Printed Appeal Record, pp. 1, 2), or said pretended Amended Supplemental Duplicate De-

linquent Tax Roll of June 23, 1954; and in allowing costs and making them a lien upon Objector Yakutat & Southern Railway's real property notwithstanding the length of this litigation has been Applicant's fault and the Court found that Applicant's procedure was irregular.

This motion is based upon the records, dockets, and files of this cause and upon the Official Court Reporter's notes of the various proceedings herein, and upon the Applicant's Tax Ordinances 1, 2 and 4, which are now in the custody of the Clerk of this Court, and in regard to interest upon Applicant's admission in its brief of June 24, 1954, in Cause No. 6734-A, of the ambiguity of Section 12 of its Tax Ordinance 1; and in support thereof Objectors cite, in addition to those decisions heretofore cited to the Court, the U. S. Supreme Court decisions of *Gould v. Gould*, 245 U. S. 151, 153, and *U. S. v. Merriam*, 263 U. S. 179.

Dated at Juneau, Alaska, July 2, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objectors.

[Endorsed]: Filed July 2, 1954.

[Title of District Court and Cause.]

NOTICE OF HEARING BY APPLICANT ON
OBJECTORS' MOTION FOR NEW TRIAL

To the Above-Named Objectors and Their Attorney
R. E. Robertson, Esq.:

Please take notice that applicant in the above-entitled causes will call up for hearing before the above-entitled Court at its courtroom in the Federal Building at Juneau, Alaska, at the hour of 10:00 o'clock a.m., July 26, 1954, your motions for new trial in said causes which motions were served on applicant on July 2, 1954.

July 21, 1954.

/s/ WILLIAM L. PAUL, JR.,
Applicant's Attorney.

[Endorsed]: Filed July 21, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE UNITED
STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT UNDER RULE 73(b)

Notice is hereby given that Libby, McNeill & Libby, a corporation, and Yakutat & Southern Railway, a corporation, the Objectors in the above proceedings, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that certain Order of Sale made and entered in the above pro-

ceedings on June 29, 1954, and from that certain Order, made and entered in said Proceedings on July 28, 1954, denying their Motion for New Trial.

Dated at Juneau, Alaska, this 30th day of July, 1954.

/s/ R. E. ROBERTSON,
Attorney for Objector Appellants Libby, McNeill &
Libby and Yakutat & Southern Railway.

Receipt of copy acknowledged.

[Endorsed]: Filed in open court July 30, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS ON APPEAL

Whereas, Libby, McNeill & Libby, a corporation, and Yakutat & Southern Railway, a corporation, the objectors in the above proceedings, have appealed to the United States Court of Appeals for the Ninth Circuit from that certain order of sale made and entered in the above proceedings on June 29, 1954, wherein and whereby in the above proceedings the District Court for the Territory of Alaska, First Judicial Division, ordered the sale of the objectors' real property to be sold by said applicant at public sale to satisfy and discharge the lien of the taxes that are the subject of said proceedings, together with penalty and interest and costs upon said taxes and costs and disbursements of this proceeding including an attorney fee, and from that

certain order, made and entered in said proceedings on July 28, 1954, denying objectors' motion for a new trial; and,

Whereas, said objectors are desirous of staying the sale so ordered by said order of sale and so appealed from, and the Court has set, with applicant's consent, the penal amount of the supersedeas and cost bond in the sum of \$4,000.00.

Now, Therefore, in consideration of the premises and such appeal, we Libby, McNeill & Libby, a corporation, objector, and Yakutat & Southern Railway, a corporation, objector, as Principals, and the United States Fidelity and Guaranty Company, a corporation organized and existing under the laws of the State of Maryland and engaged in and authorized to engage in business in the Territory of Alaska, as Surety, do hereby jointly and severally undertake and promise, and acknowledge ourselves bound in the sum of \$4,000.00 that the objector corporation Libby, McNeill & Libby and objector corporation Yakutat & Southern Railway will satisfy in full said taxes, together with penalty and interest and costs upon said taxes, and costs and disbursements of this proceedings, as well as damages for delay, if for any reason the appeal is dismissed or if said order of sale is affirmed, and similarly to any and all extent should said order of sale be modified, and such costs, interest, and damages, as the appellate court may adjudge and award.

In Witness Whereof Libby, McNeill & Libby, a corporation, objector, and Yakutat & Southern Rail-

way, a corporation, objector, as Principals, and United States Fidelity and Guaranty Company, a corporation, as Surety, have caused these presents to be executed this 30th day of July, 1954, in Juneau, Alaska.

LIBBY, McNEILL & LIBBY, a
Corporation, Objector;

By /s/ R. E. ROBERTSON,
Its Attorney and Agent.

Executed in the presence of:

/s/ F. O. EASTAUGH,

/s/ EILEEN ROBERSON.

YAKUTAT & SOUTHERN
RAILWAY, a Corporation,
Objector;

By /s/ R. E. ROBERTSON,
Its Attorney and Agent,
Principals.

Executed in the presence of:

/s/ F. O. EASTAUGH,

/s/ EILEEN ROBERSON.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation;

By /s/ R. E. ROBERTSON,
Its Attorney-in-Fact & Agent,
Surety.

Executed in the presence of:

/s/ F. O. EASTAUGH,

/s/ EILEEN ROBERSON.

Attest: Corporate Seal.

United States of America,
Territory of Alaska—ss.

Acknowledged before me this 30th day of July, 1954, in Juneau, Alaska, by R. E. Robertson as attorney and agent of the objector corporations Libby, McNeill & Libby and Yakutat & Southern Railway, Principals, as their free and voluntary act and deed and as attorney-in-fact and agent on behalf of the United States Fidelity and Guaranty Company, a corporation, Surety, as the latter's free and voluntary act and deed.

Witness my hand and official seal the day and year herein first written.

[Seal] /s/ FREDERICK O. EASTAUGH,
Notary Public for Alaska.

My commission expires June 10, 1958.

Approved and appeal allowed and order of sale stayed this 30th day of July, 1954, in Juneau, Alaska.

[Seal] /s/ GEORGE W. FOLTA,
Judge of the District Court for the Territory of
Alaska, Division No. 1.

[Endorsed]: Filed in open court July 30, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND
DOCKET APPEAL

It appearing to this Court that the objecting Appellants requested the official Court Reporter on July 30, 1954, to prepare the transcript of all proceedings reported by her in the above action but that she has not yet done so and is now absent on vacation and does not contemplate returning to Juneau, Alaska, from her vacation until on or after September 10, 1954, but that Appellants' present time within which to file and docket their appeal will expire on September 9, 1954, and that it is impossible for them to so file and docket their appeal until they are furnished by the Reporter with her said transcript,

Now, Therefore, It Is Hereby Ordered that the Appellants be, and they are hereby, granted until October 10, 1954, within which to file their record on appeal and docket their appeal with the Clerk of the United States Court of Appeals for the Ninth Circuit in San Francisco, California.

Done in Anchorage, Alaska, this 31st day of August, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO FILE AND DOCKET APPEAL

Objectors having made and filed herein their Motion for an extension of time until October 28, 1954, to file and docket their appeal with the United States Court of Appeals for the Ninth Circuit, and it appearing that owing to pressure of work the official court reporter was unable until October 2, 1954, to transcribe and file her transcript of all the proceedings reported by her in the above action, and that the Deputy Clerk in Juneau is under such pressure of work that she will not be able to prepare and certify for inclusion in the record on appeal this Court's record in time to reach the Honorable United States Court of Appeals for the Ninth Circuit by October 10, 1954, the praecipe for which record the Objectors filed with the Clerk in Juneau in the forenoon of October 4, 1954, and that on August 31, 1954, this Court by its Order extended the time to file and docket the appeal with the appellate court until October 10, 1954, they having on July 30, 1954, served and filed their Notice of Appeal to the appellate court, and that the 90-day period within which to file and docket said appeal will not expire until October 28, 1954,

Now, Therefore, It Is Hereby Ordered that the Objectors be, and they are hereby, granted until October 28, 1954, within which to file their record on appeal and docket their appeal with the Clerk

of the United States Court of Appeals for the Ninth Circuit in San Francisco, California.

Done in Ketchikan, Alaska, this 6th day of October, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed October 6, 1954.

[Title of District Court and Cause.]

MINUTE ORDERS

Minute Order Dated Friday, April 25, 1952, as entered in Journal No. 20, Page 415.

This matter came before the court for the signing of the Findings, Conclusions and Judgment. Both parties had filed their proposed pleadings. After discussion between court and counsel, the Court took the matter under advisement.

Minute Order Dated Saturday, April 26, 1952, as entered in Journal No. 20, Page 419.

At this time the Court signed the Findings of Fact, Conclusions of Law and Order of Sale as presented by William L. Paul, Jr., in behalf of the City of Yakutat. Upon request of R. E. Robertson, counsel for the Objectors, the Supersedeas Bond was set at \$3,500.00. No attorney fee was allowed because of irregularities on the part of the Yakutat of the kind that encourage litigation.

Minute Order Dated Wednesday, April 30, 1952, as entered in Journal No. 20, Page 425.

There appeared R. E. Robertson who presented to the court a Supersedeas Bond on Appeal in the amount of \$3,500.00. Upon oral motion to Mr. Robertson, the Court signed an Order approving the Bond, allowing the appeal and staying the sale of the property therein.

Minute Order Dated Friday, May 16, 1952, as entered in Journal No. 20, Page 441.

There appeared R. E. Robertson, Counsel for Libby, McNeill & Libby and Yakutat and Southern Railway, who moved the court for an order extending the time in which to docket their appeal in the United States Court of Appeals for the 9th Circuit. After consideration the Court signed an Order extending the time to and including July 15, 1952.

Minute Order Dated Friday, May 16, 1952, as entered in Journal No. 20, Page 443.

At this time R. E. Robertson, counsel for the Objectors herein, brought up the matter of having the court make an order regarding the rejection of the Findings of Fact and Conclusions of Law as proposed by the Objectors. The Court stated that it has signed the Findings of Fact and Conclusions of Law as presented by the Petitioner and that such signing infers the rejection of findings submitted which are inconsistent with those submitted and signed.

Minute Order Dated Friday, May 7, 1954, as entered in Journal No. 21, Page 443.

This case was called upon on Objectors' Motion for Judgment on Mandate, and Petitioner's objections thereto. Wm. L. Paul, Jr., for Petitioners; R. E. Robertson for the Objectors. Mr. Robertson spoke briefly and submitted the motion. Mr. Paul stated his objections to the motion and stated that he would produce authorities for his position.

Minute Order Dated Tuesday, May 11, 1954, as entered in Journal No. 21, Page 445.

Petitioners had filed a Motion for Trial and noticed it for being called up at this time. Wm. L. Paul, Jr., appeared for Petitioners; F. O. Eastaugh appeared in behalf of R. E. Robertson, counsel for Objectors. Mr. Eastaugh objected to the setting of the case for trial in behalf of Mr. Robertson, calling attention to the rule which requires notice to the opposing parties. After discussion, the court ruled that the time for notice could be shortened by the Court, and advised Mr. Paul that if he desired to present such an Order, the court would allow same and then set the date for trial.

Minute Order Dated May 12, 1954, as entered in Journal No. 21, Page 448.

Upon presentation the Court signed Order shortening the time to hear a Motion and setting this matter for hearing on June 24, 1954.

Minute Order Dated May 13, 1954, as entered in Journal No. 21, Page 450.

Upon presentation, the Court signed an Order Denying Applicant's Objections to Judgment on the Mandate.

Minute Order Dated Thursday, June 24, 1954, as entered in Journal No. 21, Page 462.

This matter came on for hearing on the following motions. William L. Paul, Jr., was present for Plaintiff; R. E. Robertson for Objectors. Mr. Paul offered the Deposition of Dorothy Henry, City Clerk of Yakutat and the entire previous record, except portions which he had moved to strike. Mr. Robertson renewed all previous objections considered by the court. Mr. Robertson filed a Motion to Strike Amended Supplemental Delinquent Tax Roll for 1949. He also filed Objectors' Renewal of Motion to Vacate Order Shortening Time, which included an Order setting this Proceeding for Trial at this time; (2) Motions to suppress Dorothy Henry's Deposition; (3) Objections to the taking of Dorothy Henry's Deposition and (4) Objections to Applicant's Motion to strike certain portions of the printed record on Appeal. After counsel presented their arguments, the Court took the matter under advisement.

Minute Order Dated Tuesday, June 29, 1954, as entered in Journal No. 21, Page 475. Applies to Nos. 6581-A and 6734-A.

At this time these matters came before the court for hearing on Objections to Order of Sale in the above-entitled cases. William L. Paul, Jr., was

present in behalf of Plaintiffs; R. E. Robertson for Objectors. After argument the Court directed that in Cause No. 6581-A evidence heretofore introduced in support of objections to the Tax Roll be considered in support of the objections to the present tax roll. Thereafter the Court signed Order of Sale in each case.

It was stipulated that the amount of the supersedeas bond in Cause No. 6581-A may be fixed at \$4,000 and in Cause No. 6734-A at \$6,000.

Minute Order Made on Tuesday, July 27, 1954, as entered in Journal No. 21, Page 493. Applies to Nos. 6581-A and 6734-A.

Hearing on Motion for a New Trial in the above cases set for 2 p.m. Wednesday, July 28th.

Minute Order Dated July 28, 1954, as entered in Journal No. 21, Page 496.

Objectors' Motion, on June 30, 1954, to amend or alter the Minute Order entered in Cause No. 6581-A on June 29, 1954, was allowed upon applicant's consent but subject to applicant's non-admission of any objectors' legal conclusions stated in their Objections in support of their motion, dated June 23, 1954, to strike Applicant's Amended Duplicate Delinquent Tax Roll for 1949, dated June 23, 1954, and without admitting the legal validity of those Objections.

Objectors' Motions for New Trial in both Causes Nos. 6581-A and 6734-A, after argument of counsel, were denied.

Applicant's Application to withdraw its original municipal records on deposit with the Clerk of the Court was allowed upon applicant's agreement that it would promptly return into the custody of the Clerk such of those records as the objectors might request.

Minute Order Dated Friday, July 30, 1954, as entered in Journal No. 21, Page 500. This applies to Nos. 6581-A and 6734-A.

At this time Mr. R. E. Robertson, Attorney for Objector Appellants, Libby, McNeill & Libby and Yakutat & Southern Railway, filed Notice of Appeal to the U. S. Court of Appeals for the 9th Circuit under Rule 73(b) and Supersedeas on Appeal, which the Court approved, Mr. Wm. L. Paul, Jr., Attorney for Applicant Appellee for City of Yakutat was present and stated he had no objection to filing.

Approved and appeal allowed and order of sale stated this 30th day of July, 1954, in Juneau, Alaska.

Minute Order Dated October 6, 1954, as entered Journal No. 22, Page 39.

Upon consideration of the Objectors' Motion for Extending Time to docket Appeal, the Court granted the motion and signed an Order thereon.

In the U. S. District Court for the District of
Alaska, Division Number One, at Juneau

No. 6581-A

In the Matter of

THE DELINQUENT TAX ROLL OF REAL
AND PERSONAL PROPERTY FOR THE
CITY OF YAKUTAT, ALASKA, FOR THE
YEARS 1948 AND 1949

LIBBY, McNEILL & LIBBY, a Corporation, and
YAKUTAT & SOUTHERN RAILWAY, a
Corporation,

Objectors.

REPORTER'S TRANSCRIPT OF RECORD

Bt It Remembered that on the 8th day of January, 1954, court having convened at 10:00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; upon the calling of the Motion Calendar the following proceedings were had with reference to the above-entitled cause:

The Clerk: No. 6581-A, City of Yakutat, In the Matter of the Delinquent Tax Rolls, 1948 and 1949. October 8, Motion to File Mandate and for Judgment on Mandate. Mr. Paul and Mr. Robertson. That mandate is in my office.

The Court: Well, the motion is granted.

Thereafter on the 28th day of April, 1954, court having convened at 2:00 o'clock p.m. at Juneau,

Alaska; the [1*] Honorable George W. Folta, United States District Judge, presiding; William L. Paul, Jr., attorney for the applicant, and R. E. Robertson, attorney for the objectors, both being present; the following proceedings were had:

The Clerk: Next is the argument in No. 6734-A, In the Matter of the Delinquent Taxes of Yakutat for the years 1950 and 1951.

Mr. Robertson: If the Court please, before that matter is presented I would like to call the Court's attention to the fact, I supposed it was submitted last fall, but the Court has never entered the judgment on the mandate from the Circuit Court of Appeals which I presented here last October. I think it ought to be signed, your Honor. It has never been signed.

The Court: If it was presented, it would have been signed.

Mr. Robertson: Anyhow, it is here and it has never been signed up.

Mr. Paul: I have some objections to that, your Honor, to the form of order.

Mr. Robertson: Judgment on mandate.

Mr. Paul: That is right, judgment on mandate. I have just been waiting for counsel to call the matter up.

The Clerk: Hasn't the mandate ever been presented? [2]

Mr. Paul: The judgment on the mandate is what he is talking about.

*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

The Court: Has the mandate been spread on the journal of the Court?

The Clerk: That is the question I asked, may it please the Court. Is it in our file?

Mr. Robertson: It has been in your file since last fall.

The Court: Is the entry of a judgment here on the mandate necessary to this argument scheduled for this time?

Mr. Paul: I don't think so.

Mr. Robertson: I think it should be entered because after all it is a mandate that has come down from the Appellate Court.

The Court: Well, I understand that. The only question is whether it should be entered now, whether it is necessary to——

Mr. Robertson: I would like to have it entered, your Honor. The Appellate Court itself taxed \$719 against the City of Yakutat, which I have conversely wrote to Mr. Paul about months ago trying to make some kind of settlement or agreement about it, but I got no response from him, and it seems to me only proper it should be entered.

The Court: Well, there isn't any question about it, but counsel here has said that he wants to object to it, and [3] my inquiry was made with the view to determine whether it had to be entered before this argument could be heard.

Mr. Robertson: I think it is appropriate. I don't say it has to be.

The Court: I think maybe you should have filed written objections to it if you wanted to object to it.

Mr. Paul: As soon as it is noticed for hearing——

Mr. Robertson: It shows there I gave him notice, over six months ago.

Mr. Paul: You have abandoned your notice.

Mr. Robertson: No; I never abandoned my notice at all.

Mr. Paul: What happened is this, that we have taken the money we have gotten and applied it to the personal property taxes and also gave him credit for his costs. That is what has happened. The form of order doesn't recognize that. I did respond to counsel when he asked me for my comments on the form of order. He just doesn't agree with my method of proceeding.

Mr. Robertson: That is the first time that I ever heard that he even applied anything on the costs, your Honor. This affidavit that he has made in a letter to the Clerk on October 8th last, or a copy of which was sent to the Clerk, I don't recall in that that he ever made any such statement as that. [4]

Mr. Paul: I did respond, and you protested most strongly, too, against my view.

The Court: Well, it will come up on the next motion day, and in the meantime you may file your objections to it.

Mr. Paul: Thank you.

Thereafter on the 10th day of May, 1954, court having convened at 10:00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; William L. Paul,

Jr., attorney for applicant, and R. E. Robertson, attorney for objectors, both appearing; the following proceedings were had:

Mr. Robertson: Has the Court made any official announcement in No. 6581?

The Court: About a week ago.

Mr. Robertson: Saturday?

The Court: I said about a week ago.

Mr. Robertson: I hadn't been informed of it. Your Honor told me about it personally Saturday morning in your room, but I didn't know—Mr. Lievers told me he hadn't received it.

The Court: Oh; I had in mind another case. That was decided Saturday morning. I don't know why the Clerk didn't notify you.

Mr. Robertson: The way that Mr. Paul sought to apply the costs in that case was overruled; was that it? [5]

The Court: Yes.

Thereafter on the 10th day of May, 1954, court having reconvened at 2:00 o'clock p.m., at Juneau, Alaska; at the conclusion of a hearing in cause No. 6734-A; the Honorable George W. Folta, United States District Judge, presiding; William L. Paul, Jr., attorney for applicant, and R. E. Robertson, attorney for objectors, both appearing; the following proceedings were had:

Mr. Paul: Now, while we are on the subject of Yakutat, your Honor, it appears to me that in the other case we are ready to go ahead. I can state very frankly now for the Court's convenience——

The Court: You mean there is another tax case for Yakutat?

Mr. Paul: It is the other tax case, the first one. As the Court said, the liability of Libby, McNeill & Libby is contingent. I state very frankly that the only evidence I would introduce would be the same page from the assessment book as——

The Court: Well, but I don't understand. What is involved in this other case now?

Mr. Paul: We have got to present some evidence that we can segregate personal property from real property, whereupon we are ready for another order of sale.

The Court: Well, was that case set? [6]

Mr. Paul: No; but I am suggesting that it can be because it is so awfully simple.

Mr. Robertson: If the Court please, I am not coming under that kind of agreement at this time. I had no idea—frankly, I think the case is disposed of—gone. I think they have to devise some other way. The taxes are paid.

The Court: You mean it can't be retried?

Mr. Robertson: I think that is a final decision in that case. Yes, your Honor.

The Court: Why would a reversal be a final decision?

Mr. Robertson: It says the order is entirely void. It doesn't give a right for a new trial. The proceedings were absolutely void.

The Court: Well, I don't remember what the status was of the record there. I don't know

whether he would have to start all over or whether he could proceed from where he did before.

Mr. Paul: I took the Court's Memorandum Decision, handwritten——

The Court: Well, that referred to costs only.

Mr. Paul: But at the same time the Court characterized the liability of Libby, McNeill & Libby as contingent. In other words, now, sometime, why, the contingency could be fixed.

The Court: If the state of the record is such that [7] we can begin from where we began before, but if it is going to require a new assessment roll, why, I don't see how we can.

Mr. Paul: No. Our position then is merely advising the Court that my view of the case is that it will be extremely short and simply introduce this Plaintiff's Exhibit No. 2 that we introduced in this case this morning (referring to cause No. 6734-A).

The Court: I suppose it will have to be set for trial in the usual way.

Mr. Robertson: Well, I don't agree that it can be set for trial, your Honor, but, if Mr. Paul insists on trial, I mean, is going to ask for trial, I would want some time on it, your Honor.

The Court: Well, if you want to oppose it—then, you (Mr. Paul) better move for a retrial, and, if he wants to oppose it, why, he may oppose it.

Thereafter on the 11th day of May, 1954, at 10:00 o'clock a.m., at Juneau, Alaska, before the Honorable George W. Folta, United States District Judge; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by Frederick

Eastough, of their attorneys; the following proceedings were had:

Mr. Paul: May it please the Court, I have noticed a motion in No. 6581-A, that is the Yakutat Delinquent Tax Roll for 1948 and 1949, to set the case down for hearing or to [8] perpetuate the evidence of Dorothy Henry. The only evidence that will be perpetuated will be her identification of the assessment roll which she has already identified in another case. We find, however, that she was able to get passage on the airplane and left town at six o'clock this morning, so I think the only thing left of my motion is to have the case set down for hearing. I would suggest two o'clock this afternoon, but in the absence of——

The Court: Well, how are you going to do it without her?

Mr. Paul: We can't. It would have to be sometime whenever the Court returns to the city. I don't suppose it would be possible to do it this week.

Mr. Eastough: Your Honor, that is quite another surprise. I am authorized to appear by Mr. Robertson to protest the lack of jurisdiction of the Court to hear this motion. It was served at four o'clock yesterday afternoon. The Court Rules provide for an order of the Court in so-called emergencies. The only emergency was that he has had many months to call this thing up and the emergency occurred sometime yesterday. That is what the emergency is, and serve a motion for a new trial and then admit that there is no more emergency and then have the setting here in the absence of counsel.

I mean, one liberty is taken, and then suddenly it resolves into a further one, and we are protesting it. I think it should be put [9] on the regular motion calendar and called up at the regular time.

The Court: Well, what motion is pending now?

Mr. Paul: To set the case down for hearing.

The Court: You mean there is a formal motion to that effect?

Mr. Eastaugh: It should be called with the other cases.

The Court: Well, as I understand it, you want to object to the motion?

Mr. Eastaugh: He has withdrawn the motion, but he has converted it, your Honor, into a request for setting it at a definite time, in the absence of Mr. Robertson.

The Court: Well, I didn't ask you exactly what he did, but what do you want to do; do you want to object to this motion?

Mr. Eastaugh: I understand the motion is withdrawn, but now he has asked for a setting of the case, and I think that should come up at the regular time.

The Court: Well, that is all that he has asked for in this motion, I take it. That is all he asked for in the motion, so the motion doesn't seem to have been withdrawn.

Mr. Paul: No.

The Court: Now, then, if you want to oppose the motion to set it for trial, why, you may do that. [10]

Mr. Eastaugh: I am not opposing it on that

ground, but I think that it should come up at the regular time.

The Court: Well, you mean you object to hearing the motion for trial then in advance of the regular motion day?

Mr. Eastaugh: Yes, your Honor.

The Court: Well, the Court is going to leave here before the next motion day. As I understand it, the question is whether we can start with the assessment roll or will have to go beyond that. What about that?

Mr. Paul: Go beyond the assessment roll?

The Court: Yes; and start it some place before that.

Mr. Paul: I don't think so, your Honor. We have taken very extensive testimony already, and that is part of the record. The only issue left to satisfy the Court of Appeals would be the evidence of segregation.

The Court: Well, but wouldn't that have to be done in the assessment roll?

Mr. Paul: It is in the assessment roll. The only thing I wanted the witness to identify was the assessment roll.

The Court: Well, if it is in the assessment roll, then why would the Court of Appeals say it wasn't segregated?

Mr. Paul: It was not in the duplicate tax roll. That was the only thing that went up on the record. The assessment roll was not produced in evidence originally.

The Court: Well, wasn't the duplicate identical with [11] the assessment roll?

Mr. Paul: The duplicate delinquent tax roll, no, was not identical in the sense that——

The Court: But it was prepared from the assessment roll?

Mr. Paul: Yes; and——

The Court: Well, then, wouldn't you have to present a new duplicate assessment roll, one that has the items segregated?

Mr. Paul: No. Perhaps we are confusing our terms here. What we present with our application for sale is the duplicate delinquent tax roll. We do not present the assessment roll. In almost all instances I have prepared the duplicate delinquent tax roll.

The Court: Well, regardless of what it is called, it was apparently found deficient. Now, what I am interested in is not in the names of the thing, but how are you going to overcome that objection?

Mr. Paul: Just in the usual assessment roll with those segregations. That is of record, and the same identical page is of record in the case we tried yesterday.

The Court: You mean that the delinquent roll can be just simply ignored then; is that it?

Mr. Paul: Yes. In other words, we look at the whole record, the evidence of all sorts. [12]

The Court: Well, you say that was in the record?

Mr. Paul: No. The assessment roll was not in the record originally; only the duplicate delinquent

tax roll which conforms, in so far as the totals are concerned, with the assessment roll.

The Court: Well, this would be a case where you would supplement the delinquent roll by the assessment roll?

Mr. Paul: Yes, sir.

The Court: Well, I doubt whether any purpose could be served in hearing this motion specially now, but, as I understand it, you want a definite time fixed for trial; is that it?

Mr. Paul: That is all it amounts to, your Honor. We will go ahead and take Mrs. Henry's deposition.

Mr. Eastaugh: Your Honor, I think I should object to setting trial in the absence of opposing counsel.

The Court: Well, if he wants to object to it, he can, but he would have to have some valid grounds because of the time that will be allowed. I was going to set it for the 24th of June.

Mr. Eastaugh: Your Honor, this is tantamount to him having the motion heard this morning. If you set this case today, that is equivalent to him hearing this motion. There is no emergency, your Honor.

Mr. Paul: The Court can do this on its own motion, [13] your Honor. I don't even have to raise it myself.

The Court: I don't see why, unless there is some objection that amounts to something, that it should be interposed.

Mr. Eastaugh: Your Honor, counsel has difficulties in the time element. Now, here is appar-

ently something new all of a sudden cropping up yesterday, of which counsel had absolutely no notice of this matter going on to trial. Then he serves a motion without an order of the Court, which is required by our own local Court Rules, and he calls it for—another reason for objecting to that is he calls it for perpetuating testimony.

The Court: I don't understand what you mean by saying that he serves a motion without an order of the Court. Why would he require an order of the Court?

Mr. Eastaugh: Because the local rules call for it, your Honor.

The Court: What—a motion for trial requires an order of the Court?

Mr. Eastaugh: Yes, your Honor. Any motion requires five days' notice unless an order of the Court is given suspending that five days' notice.

The Court: Well, you mean that you object to what amounts to a hearing of this motion in less than five days without an order of the Court; is that it? [14]

Mr. Eastaugh: Yes.

The Court: Well, but my point is, why raise any such objection? The Court can make an order. Why raise an objection unless it is going to serve some purpose here or it is going to contribute to the administration of justice, in other words, and not be merely obstructive or dilatory.

Mr. Eastaugh: Your Honor, I think that the real thing is here, as the Court knows and Mr. Paul knows, that Mr. Robertson is under a severe

physical handicap and he is hardly able to get around in the mornings, and calls this up at ten o'clock well-knowing that.

Mr. Paul: Oh, I don't know any such a thing.

Mr. Eastaugh: You certainly do.

The Court: Well, but it isn't what his condition is so far as a motion of this kind is concerned. If the Court sets it for the 24th, there will be plenty of time and if he is not in condition then to go to trial or if he is handicapped in some way, he can make a motion for continuance in the usual way; but I don't think that the wheels of this Court ought to stop for any insubstantial reason of that kind; that is the way it would strike me.

Mr. Eastaugh: Well, your Honor, the only point we are raising is that counsel should be required to go through according to the local rules. That is what we are observing, and we expect he should too. [15]

The Court: Well, you may present an order then shortening the time. When the order is presented, the Court will set it for trial on the 24th of June.

Mr. Paul: O.K.

Thereafter on the 13th day of May, 1954, court having convened at 2:00 o'clock p.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; M. E. Monagle, of attorneys for objectors, appearing; the following proceedings were had:

Mr. Monagle: May it please the Court, last Friday In the Matter of the Delinquent Tax Rolls for the City of Yakutat against Libby, McNeill &

Libby, No. 6581-A, the Court denied the objections, and Mr. Robertson prepared an order, and Mr. Paul received a copy of it there.

Thereafter on the 11th day of June, 1954, at 4:00 o'clock p.m., at Anchorage, Alaska, before the Honorable George W. Folta, United States District Judge; the applicant not appearing; the objectors appearing by Raymond Plummer, of their attorneys; the following proceedings were had:

The Court: I suppose we may proceed *ex parte* in view of the fact that your opponent relies on his brief.

Mr. Plummer: Very well, your Honor. If the Court please, this is In the Matter of the Delinquent Tax Rolls for the year 1948-1949 of the City of Yakutat, Cause No. 6581-A in the District Court of Alaska, Division No. 1 at Juneau. [16]

The Court will recall that this matter was heard by the Court at Juneau. The decision was entered and reported in 111 Federal Supplement, page 387. Appeal was taken, and the Circuit Court of Appeals reversed it, and that is reported at 206 Federal 2nd 612. A petition for rehearing was filed by the City of Yakutat. The petition was denied, and in due course of time a mandate was handed down. Subsequently a motion to file the mandate and for judgment on the mandate was filed. There were objections filed by the City of Yakutat to the proposed form of judgment. Those objections were subsequently overruled. A mandate was filed, and subsequently a judgment on the mandate was en-

tered whereby the order of the Court, which had been entered on April 25, 1952, was vacated and set aside, and judgment was entered in favor of the objectors, Libby, McNeill & Libby and Yakutat & Southern Railway, a corporation, against the City of Yakutat in the amount of \$719.94.

Now, it is our contention, your Honor, that that ended the case, that was the final thing to be done, and it was done, and that the proceeding should have stopped at that point. However, I believe that judgment on the mandate was entered on or about May 8, 1954. On May 10, 1954, the attorney for the City of Yakutat filed a motion to set the case for trial or in the alternative to permit the taking of the deposition of the witness Dorothy Henry, and in connection with that [17] motion he moved that the time be shortened so that the motion could be heard on May 11th inasmuch as the Court was departing Juneau. On May 11th the Court granted a motion to shorten the time to May 11th and further ordered that the motion to set the case for trial be allowed and fixed the time for the trial at 10:00 a.m., June 24, 1954. Subsequently objections were filed to the interrogatories in connection with the deposition of Dorothy Henry as a witness, and on May 28th the Libby and the Yakutat & Southern Railway filed objections to the—filed a motion to vacate the order entitled “Order for Shortening Time,” which was the order setting the case for trial. Have you read the motion, your Honor?

The Court: Yes.

Mr. Plummer: Then I will not read the entire motion. In substance it is that the Court was without jurisdiction to set the case for trial on June 24th or at any other time inasmuch as the case was concluded by the entry of the judgment on the mandate, and the motion has been filed to suppress the deposition of Dorothy Henry, the City Clerk of the City of Yakutat.

In connection with the presentation of this matter, your Honor, since the time is limited, I would like to make a relatively brief oral argument and then submit a memorandum of authorities for the Court's consideration.

This proceeding under which the proceedings were had [18] is a special proceedings. It is specifically denominated a special proceedings; for example, in Section 16-1-121 of the Code, 1949, it is provided that "such sale to be made under the special proceedings hereinafter set forth." The Appellate Court in its opinion denominated it, or described the proceeding, as being a "statutory proceeding." This being so, and being a special proceeding for the collection of taxes upon real property, the statutory requirements must be exactly observed. There have been a number of Federal cases cited in support of that proposition, and Mr. Robertson's brief in Cause No. 13455, being the case number of this action on appeal, at pages 67-69.

The delinquent tax roll in a proceeding such as this is the sole pleading or document upon which the municipality's application to enforce the tax

lien by sale of the realty is founded. The entire proceedings is conditioned upon the delinquent tax roll.

Section 16-1-122 of the Code specifically details the requirements of the delinquent tax roll's preparation, contents, certification, filing with the city clerk, notice of preparation and filing with the city clerk, presentation to the District Court, and notice thereof.

Section 16-1-123 specifically details the statutory method of presentation to the District Court and of giving notice thereof. [19]

The duplicate delinquent tax roll that is presented to the Court is the controlling document, not the one on file with the city clerk. Section 16-1-126 provides that the "Clerk to correct original delinquent tax roll and sell property. The clerk of the city shall immediately after the order of sale correct the original delinquent tax roll to correspond in all respects with the delinquent roll as passed upon and allowed by the Court."

Without complying with all of those statutory requirements, the application cannot be allowed. The order of sale, if granted or if denied, is the final judgment. The statute clearly prescribes its finality.

The last subparagraph of Section 16-1-121 of the Code is entitled "Council may enforce lien by sale." It further states, in part, that "such sale shall be by order of the District Court."

Section 16-1-122 of the Code in three instances uses the term "judgment and order of sale."

Section 16-1-123 uses the terms “of notice of application for sale,” and “an order of sale” and “shall by general order direct the several tracts therein described to be sold” and “a certified copy of such order of sale shall be attached” and “shall have the same effect as an order of sale of real estate in a civil action.”

Section 16-1-124 provides for objections to [20] “the granting of the order of sale” and that certain findings “will be sufficient to authorize the issuance of the order of sale.” Section 16-1-124 also uses the term “order of sale.”

Section 16-1-128 of the Code prescribes that the city clerk’s certificate of sale shall contain “the date of the order of sale and the court issuing the same.”

Section 16-1-130 of the Code prescribes that the tax deed shall contain “the date of the order of the sale and the court issuing the same.”

The finality of the order of sale is clearly declared by the statute creating this special proceedings. Moreover, the Appellate Court in this proceedings on appeal treated and considered the trial court’s order of sale as a final order or judgment. The Appellate Court having held that no part of the trial court’s order of sale can stand, and having reversed that order, nothing more is to be done in this proceedings other than for the trial court to obey the Appellate Court’s opinion and mandate. It cannot legally do anything else or more. It has no duty, nor can it legally attempt, to construe the Appellate Court’s opinion and mandate in any other

manner, nor can it now allow the municipality to attempt to amend the duplicate delinquent tax roll upon which both the trial and the Appellate Court's decisions were based or to introduce any new or newly discovered evidence, nor has this Court any jurisdiction to admit further evidence. The municipality had its [21] opportunity at the original trial to prove its defenses to the objectors' objections. All the evidence both pro and con was before this Court and the Appellate Court. A trial has been had thereon. This Court cannot now admit further evidence in support of, or in defense of, those objections.

Evidently by the deposition that the municipality proposes to take of present City Clerk Henry it proposes to introduce further evidence, not even newly-discovered evidence, in an attempt to prove that the taxes, interest and penalty can be separately segregated as to real and personal property taxes, so as to overcome the Appellate Court's finding: "Since there is nothing in the record to indicate, and no basis for a presumption that the realty was properly assessed, or, if properly assessed, that any specific amount of taxes thereon is unpaid, the City has made no case against appellants." The evidence, the production whereof is the objective of that deposition, has been before both the trial and the appellate courts. It was set out in same form on page 148 of the Printed Record on Appeal. Moreover, the City in its petition for rehearing before the Appellate Court, which petition was denied, specifically directed that Court's attention

to that and other pages of the Printed Record on Appeal, showing that same kind of evidence.

On page 8 of that petition the City said, "But the record is replete with evidence from which the Court could make [22] findings. Pages 117 to 126, 131, 134, 137, 147 to 149, then 152 to 155, 162, and following. We respectfully urge that the case be remanded for the entry"—and quoting from the petition—"We respectfully urge that the case be remanded for the entry of findings on the amount of taxes assessed on the real and personal property, respectively, and that an order of sale be issued as to the real property."

Despite the Appellate Court's denial of a rehearing with that evidence in the record before it, the trial court has granted a retrial and seemingly intends to permit the City to put in that very evidence to prove that the taxes, interest, and penalty can be separately computed upon the real and personal property, not from the delinquent tax roll but from other evidence which either in form or substance was before both the trial court and the Appellate Court when they made their respective decisions, and which does not appear in the delinquent tax roll upon which the statute requires the granting or the denial of the order of sale to be based.

The applicant City now intends to present evidence, actually evidence already before both this and the Appellate Court; but, even if newly discovered, it would be immaterial to prove that the Appellate Court was incorrect when it said in its

opinion: "The difficulty, however, is that the amount of taxes, penalty and interest due upon the realty alone is not shown in the record. If the amount was separately stated in [23] the delinquent tax roll filed by the City with its application for order of sale, it would be presumed that the realty was properly assessed and that the amount stated remains unpaid. Alaska Compiled Laws Annotated, 1949, Section 16-1-124. But the taxes due upon the realty and personalty were 'lumped' and stated in a single amount. This is the same as no statement at all, since there is no basis for allocating any part of the amount stated to the realty. If the realty and personalty of appellants were ever separately assessed, as the statute requires, that fact does not appear in the record."

Even if the Appellate Court was mistaken in finding that the record did not disclose such separate assessment, and the City in its petition for rehearing, page 8, contended that that fact was shown by the pages, which I have previously mentioned in arguing, of the Printed Appeal Record, yet it could not correct its mistake now and recall its mandate because the term at which it issued its mandate has expired. It heard the appeal in April, 1953, at its Seattle term commencing the second Monday in September, 1952, and rendered its opinion and issued its mandate at its San Francisco term commencing the first Monday in October, 1952, which term expired prior to the first Monday in October, 1953, which is the San Francisco term now in session, citing Rule 3 of the United States Cir-

cuit Court of Appeals, Rule for the Ninth Circuit Court of Appeals.

Objectors do not concede that the Appellate Court made [24] any such mistake, but, to the contrary, it based its opinion and mandate, as the statute required, upon the delinquent tax roll that was filed by the City with its application for order of sale. Numerous decisions hold that the United States Courts of Appeal cannot recall a mandate after the term has expired at which it was issued. Nor does the command in the mandate, that is, and I quote, "You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding," authorize or empower, either directly or indirectly, the trial court to do something which the Appellate Court itself cannot do, that is, to correct that mandate, even had, which objectors do not concede, the Appellate Court made a mistake in its issuance, nor to do anything further in this proceeding than to enter its judgment upon the Appellate Court's mandate in accordance with that mandate, inasmuch as trial has been had upon all the issues in this proceeding. There are many U. S. Supreme Court cases cited in support of that proposition in the memorandum of authorities which I will furnish to the Court.

The language of that command does not instruct the trial court to hold a new or another trial or to admit further evidence or to do anything other

than to set aside its Order of Sale of April 25, 1952, and to take the costs against the [25] City. When this Court entered its judgment on the mandate on May 8, 1954, it performed its full duty, and nothing further remains or can be legally done in this proceeding, except such actions as may be necessary to enforce objectors' costs.

The delinquent tax roll has been presented both this and the Appellate Court, and the latter Court has held that under it no order of sale can be entered by this Court. Nothing further remains to be tried or decided. The judgment upon the mandate is a final order or judgment, other than it is not appealable because second appeals are not allowable, just as this Court's Order of Sale of April 25, 1952, was final until the Appellate Court reversed it, and just as this Court's order denying the sale would have been had this Court, at the conclusion of the trial before it, properly entered an order on April 25, 1952, denying the application to sell.

Now, if the Court please, upon the basis of the oral argument made and the memorandum of authorities, which I will submit to the Court, we feel that the objectors' motion to vacate, the order, entitled "Order Shortening Time," should be vacated and that the case should not be set for trial on the 24th of this month. And, while I know the Court is busy with other matters, Mr. Robertson referred this matter to me and asked me to urge the Court to give this matter the Court's full consideration

and thereafter render a decision as promptly as possible. [26]

At this time I would like to forward to the Court a memorandum of authorities supporting the oral argument. There are several cases too that I recall distinctly where the wording of the mandate involved in those cases was quite similar, not identical, with the mandate of the Ninth Circuit Court of Appeals in this case.

The Court: Well, what interests me and what your argument is entirely silent on is the question whether your contention is that a proceeding would have to be begun anew or whether, in other words, you contend that they could not go back of the delinquent tax roll or would have to not only start anew but that they could not start with a new delinquent tax roll. Now, it seems to me that is the crucial question here. These other questions are only incidental.

Mr. Plummer: I think it is our position, your Honor, that the matter is now *res adjudicata*.

The Court: Well, but where are the authorities on that? I didn't hear you cite any authorities on it.

Mr. Plummer: I think there are authorities to that effect in the memorandum, your Honor.

The Court: I listened for them. I didn't hear them.

Mr. Plummer: No. I mean in the legal memorandum that I am handing you now.

The Court: Well, did you examine those authorities?

Mr. Plummer: I read Mr. Robertson's [27] brief.

The Court: It just seems to me that it presents the proposition that there can be no such thing as a new trial, except from the very beginning. Now, the first matter that occurs to the Court is, why should the City start from the beginning again, duplicate the evidence? Why can't they start with a new delinquent tax roll if in fact the tax records of the City are in such shape that a new delinquent tax roll, showing either only the real property or showing the segregation of both, can be prepared? In other words, what authority is there that requires the City of Yakutat now to start all over? That is what I am interested in. I think that is the kind of authority that would govern, and I certainly am opposed to doing anything such as merely duplicating legal proceedings. I think that the disposition and trend has been to avoid duplication, not only of work but of expense, and I certainly would be loath to hold otherwise, and that is why I inquired whether there are authorities that would seem to require that this proceeding be begun anew. It is difficult for me to believe that there could be any such authorities.

Mr. Plummer: The only authorities that I have are those presented by Mr. Robertson, and I don't know if they touch on that question.

The Court: I am not interested in the other authorities. If he hasn't submitted authorities on that proposition, I will have to conclude that there

aren't any and rule against [28] him because, as I say, it just makes no sense to start all over merely for the sake of starting all over again. There ought to be more reason than that, even in law, which is absurd enough already. It has enough absurdities in it without adding to them. Well, I will take the matter under advisement.

Thereafter on the 24th day of June, 1954, court having convened at 9:50 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

The Court: Have we something else to come up at this time?

The Clerk: The other one.

Mr. Paul: No. 6581-A.

The Clerk: This is In the Matter of the Delinquent Tax Rolls for 1948 and 1949 of Yakutat.

Mr. Paul: I take the position, your Honor, that this is a partial new trial. The Court of Appeals, I think, has very well defined the issue on whether a segregation can be shown. It is our position, when the Court of Appeals reversed the order, that entitled us automatically to a new trial. In the previous decision in this court in the 1949 Case the Court found against us on the 1948 tax roll; we are not renewing that. [29]

The Court: Well, you mean the Appellate Court found against you?

Mr. Paul: No. Your Honor did—1948.

The Court: 1948. --

Mr. Paul: So, the only issue left is the 1949 roll and the Court of Appeals finding whether segregation could be made, and at this time we are offering to introduce only evidence of segregation.

The Court: Well, but the question that occurs to me is whether you can proceed from the, or start from the former delinquent tax roll.

Mr. Paul: I filed an amended one, your Honor.

Mr. Robertson: If your Honor please, I don't consent or agree that the Court has any authority or jurisdiction to hold this hearing at this time or at any future time, and, in accordance with the Court's Memorandum or minute order which was entered after Mr. Plummer submitted this matter to the Court on my behalf on June 11th, I renew my motions at this time to vacate the order shortening the time, wherein it was, trial was set at this date, also the motion to suppress the deposition of Dorothy Henry, and also my objections to the notice of the taking and to the direct interrogatories to her, and also my objections to applicant's motion to strike certain portions of the printed record, and I renew all those motions, your Honor. [30]

The day before yesterday after talking with Mr. Paul over the telephone, and I told him that I was anxious to get these records down because I couldn't tell under the Court's minute order whether or not you were going to have a hearing at this time or not, and I didn't know what to do about preparing for a trial, so I served Mr. Paul a demand for production of all the City records and I also sent it

over to Yakutat and had it personally served upon Dorothy Henry, the City Clerk, and at that time in the conversation with me over the telephone Mr. Paul agreed with me that he would produce all those records, and he said he would put it in writing, so I wrote him a letter, which he confirmed, and he gave it back to me in person, and at that time he told me, and I believe he will corroborate my statement, that he intended to stand at this hearing upon the deposition of Dorothy Henry, that they didn't have any delinquent tax roll.

Yesterday afternoon about 2:45 he brought me in what he calls an amended, supplemental, duplicate delinquent tax roll, which is made out by himself, signed on behalf of Dorothy Henry, Clerk, by himself as City Attorney. I have prepared and I submit herewith and I file now a motion to strike that amended, supplemental, delinquent tax roll, and I also, in addition to my objections set out in my motion, I make to it all the objections that I made to the duplicate delinquent tax roll that was the subject and basis of this Court's order of [31] sale of April 15, 1952, and I feel that that is not a new duplicate delinquent tax roll. Of his own self, as an attorney, he just simply has made up, as I view it, what he thinks is the way you ought to compute these claimed taxes, penalty and interest.

The Court: Well, as I understand it, your position is that he would have to start as though there never had been a delinquent tax roll.

Mr. Robertson: That is correct, your Honor;

yes, sir. And I had Miss Maynard make me a transcript of the proceedings had by you where Mr. Plummer appeared, and in it you asked for authorities or said what you were interested in was authorities on the question of the necessity of the City having to start over again in these proceedings. While I thought, your Honor, in principle the authorities I submitted with that memorandum at that time, and which I didn't serve upon Mr. Paul because I didn't realize—I didn't send it over to Mr. Plummer with the idea of actually filing it; I just sent it for him as an aid, but he told me later that you asked him to file it; so, I now give Mr. Paul a copy. While I thought in principle the authorities I cited already covered that point, I have worked diligently and believe I have some further authorities that specifically support it. I don't mean to say I have found any Alaskan case that says you must go out and start a new one, but I believe the authorities I have found [32] here support that contention, your Honor, and I submit those. I put those new authorities right in where I renew my objections, your Honor.

Mr. Paul: May it please the Court, I have already given the Court the editorial authorities that follow the general rules that upon an unqualified reversal by an Appellate Court the case automatically comes back for a new trial, so in that view we don't have to——

The Court: Well, but it just strikes me that about the only kind of cases to which that rule applies is where error was committed in the trial, not

where the basic pleadings or what serves in the nature of a basic pleading or the purpose of a basic pleading is found deficient. Now, for instance, the situation would be somewhat analogous if a complaint were found deficient. Obviously, there would have to be, the complaint would have to be amended before you could start a new trial.

Mr. Paul: Right.

The Court: But the trouble is that this is not that kind of proceeding because, if you look upon the delinquent tax roll as a pleading, and I think it would have to be so looked upon in this case, then there are certain steps that have to be taken in connection with it, the steps that are set forth in the statute, and I don't see how you can meet those requirements of taking those steps by merely amending a [33] delinquent tax roll. In that respect it differs radically from a deficient complaint or deficient indictment or deficient information.

Mr. Paul: Well, your Honor, this volume, or the equivalent of it, was before the Court of Appeals. It saw the same delinquent tax roll that we are now considering. It didn't take any such view, that it would depend exclusively upon the delinquent tax roll itself in order to try to reach a decision. It looked at the entire book. Now, that is all we are doing here. We are supplying what the Court of Appeals couldn't find when it looked over the whole book.

The Court: Well, you mean the Court couldn't find any evidence of segregation?

Mr. Paul: That is right. Now, if we had had in

the record, if we had the evidence which I am offering now, the evidence of the City Clerk, consisting of the assessment roll which does show segregation, then the Court of Appeals would have found in favor of the City, not exclusively upon the delinquent tax roll but from the entire record, and there is no other conclusion, that I can see, that you can draw from the actions of the Court of Appeals. I look upon the tender of the amended, supplemental, delinquent tax roll that I filed yesterday as being merely an amended complaint for the assistance of the Court in drawing up an order. That is all.

The Court: Well, now, let's look at it this [34] way. Suppose that the question before the Appellate Court was the sufficiency of an indictment and the Appellate Court had said during the course of its opinion that, if the defendant had demanded a bill of particulars and one had been furnished, the defect in the indictment had been cured. Now, it seems to me it would be a similar situation. Now, then, upon reversal I should think that you would have to start with a new indictment, but that might not be conclusive upon the questions that are presented here. As I understand it, if I recall the Appellate Court's opinion or its scope, it merely dealt with that one question as to the omission to segregate.

Mr. Paul: Well, it went into that, and in trying to save the proceeding——

The Court: Well, your position now is that these steps, that are set forth in the statute that must be taken with reference to the preparation

and the presentation of the delinquent tax roll, need not be taken in the case of an amended tax roll? That is the thing I am in doubt about.

Mr. Paul: Yes, I think so, your Honor. After all, the parties are before the Court. There is no difficulty about locating the property. We know where that is. The evidence is replete.

The Court: Well, then, your position is that the objectors could not be prejudiced by not taking these steps but proceeding from an amended tax roll. [35]

Mr. Paul: I think that that is the sense of the opinion of the Court of Appeals. They tried to do just what I am asking this Court to do. They didn't even feel that an amended delinquent tax roll was necessary at all.

The Court: Well, if they could gather the missing material from the record.

Mr. Paul: From the record. Now we come back and I am offering the additional material. Strictly speaking, I don't think that an amended delinquent tax roll is necessary. I only tendered it with the view of assisting the Court in making its computation.

The Court: Well, you say you don't think it is necessary. Your position is that there is enough in the record?

Mr. Paul: Yes.

The Court: Why is it that the Court of Appeals held it wasn't there?

Mr. Paul: Well, I mean we have supplied the

deficiency by taking the deposition of Dorothy Henry.

The Court: You mean the record as subsequently made up, not the one presented to the Court of Appeals?

Mr. Paul: Yes.

The Court: Well, now do counsel wish to argue these numerous objections and motions?

Mr. Robertson: I have covered that point also, your Honor, about Dorothy Henry's deposition, and I called your [36] Honor's attention to the fact that, in that matter that Mr. Plummer submitted for me up at Anchorage, that that very evidence of Dorothy Henry's, except it only went to the year 1948, was before the Circuit Court of Appeals on the appeal. It set out on Page 148 of the printed record, I set it out in my letter of November 13, 1948, to the City of Yakutat, and Mr. Fred Paul in his petition for rehearing in that case at Page 8 specifically called the Appellate Court's attention to that paging because on his presentation for rehearing, which was denied, he called attention to what appeared in the record on Pages 147 to 149 of the printed record, and that is right where that is contained, on those pages there, so it was before the Circuit Court, the same sort of evidence exactly, and I have covered that particular evidence, and I don't believe you can find a case, your Honor, that permits evidence to modify, amend or impeach a duplicate delinquent tax roll, and that is what they are trying to do now. They are now trying to say "the duplicate delinquent tax roll before this Court

wasn't correct, therefore, we will show it by Dorothy Henry's deposition and what it consists of, "and, except it was for the year 1948, as a matter of fact the year 1948, these same figures, if I am not mistaken, appear right in this evidence, this document that was produced by Dorothy Henry's deposition, and of course I filed motions or objections to Dorothy Henry's deposition. I also filed a motion to suppress the deposition, and I have supported [37] it by authorities in my brief.

The Court: I think you have already stated your position. Your position is that they have to start all over.

Mr. Robertson: That is it exactly.

The Court: But why?

Mr. Robertson: Well, because, your Honor, for one reason, that the statute governs this affair.

The Court: You mean the provisions with reference to the preparation of a tax roll?

Mr. Robertson: Yes, your Honor.

The Court: But how would anybody here be prejudiced since those steps had already been taken except as to the segregation of the property? How would anybody be prejudiced?

Mr. Robertson: I will tell you why, your Honor. After all, these are substantial rights. They are trying to get a tax lien on one of these objectors' properties, the Yakutat & Southern Railway property, and sell that property and put it up for sale to satisfy liens, and I submit that is a substantial right, and we don't stand here in the position of

where we didn't pay our taxes. We paid promptly years ago. We paid the taxes on which we claimed was the actual value of the property. Now, when they come in and try to make us pay more taxes than that and don't comply with the statute and are going to sell our property, I submit we are prejudiced by it. They have got to follow the statute. There isn't any question [38] about it.

The Court: Well, stated that way there is no doubt about that, but——

Mr. Robertson: That establishes substantial rights, and we are being prejudiced by it.

The Court: Well certainly, but, where those steps had already been taken but one detail was omitted, such as segregation, then why do you say they have to take those steps again?

Mr. Robertson: Because all of this is under the statute, and the authorities all hold that the only people that can make any changes in the duplicate delinquent tax roll are those authorized by statute, and bring in the testimony of what you assess them to agree with the assessment in an entirely different book isn't making the correction on the duplicate delinquent tax roll by those who are entitled to make it or authorized to make it. There is no authority for them to do it, no statutory authority. We have a right to stand on our statutory rights. That is a prejudice to our substantial rights to not be able to rely on the statute. We can't rely in this case either on the statute or Mr. Paul's view of the statute or on their own ordinances. They don't have to do either one. And I submit to your Honor that

in the Appellate Court's decision, when they spoke rather sympathetically about the small Town of Yakutat, that was probably my fault in not [39] having in my brief explained to the Appellate Court that the Town of Yakutat has had a practicing lawyer representing them as city attorney throughout all these proceedings. They apparently thought that I, as a lawyer, or somebody was trying to take some advantage of the Town of Yakutat. I submit the Town of Yakutat stands in the same position in this case as Libby does. They have had a practicing lawyer in this court representing them and have had throughout, and Yakutat, just because it happens to be a small, little village, they are trying to charge unfair and unreasonable taxes against my clients.

I have endeavored to cover those matters, your Honor, and, while I have submitted them in writing to your Honor, I don't know that I have anything more orally to say. If the Court should refuse to grant my motion to strike what he calls the amended, supplemental, duplicate delinquent tax roll, then, your Honor, I want to make a motion for a continuance because I have to get some—the only way with these books down here—after Mr. Paul told me he was just going to rely on Mrs. Henry's deposition, I finally reached the conclusion that I couldn't use the books to any advantage, but, while I can go through the books, I have nobody here to testify. It would be a simple thing to say, "let the Court do it or the reporter or somebody" that there

isn't any such thing in there. I am submitting to you that those books will corroborate my statement about what they don't show. They are now, as I understand it, [40] all the official records of the Town of Yakutat. Is that correct?

Mr. Paul: That is what they asked for, and that is what we produced, and I just brought them over to the Clerk. I think maybe counsel is taking the narrowest view of what evidence I am offering at this time. That is why I asked the Court to begin with, "What kind of proceeding are we in; an entirely new trial, or a partial new trial?" If it is a partial new trial, which is my view, then we use all the evidence we used before in No. 6581-A, and I present and I offer in evidence at this time only the additional evidence of the deposition of Dorothy Henry.

The Court: Well, he says that that was before the Court before, before the Appellate Court.

Mr. Paul: The deposition of Dorothy Henry——

The Court: The evidence contained in the deposition. What about that?

Mr. Paul: Well, if you assume that, your Honor, the whole opinion of the Court of Appeals becomes nonsense.

The Court: Well, he gave the page number of the record—148.

Mr. Paul: Well, but he says at the same time that the 1948, and all that was before the Court of Appeals was the 1949 roll. Nobody appealed the 1948 roll.

The Court: Well, I didn't know that he was

limiting [41] his argument to 1948. He said it was on Page 148 of the printed record.

Mr. Paul: Yes. Well, that is a letter beginning on Page 147, by Mr. Robertson, dated November 13, 1948. It concerns only the 1948 roll.

The Court: Well, I thought the appeal dealt with the 1950 and 1951 taxes.

Mr. Paul: No.

Mr. Robertson: 1948-1949, your Honor.

Mr. Paul: No. 6581-A was the 1949 roll. Well, if you assume that this letter dated November 13, 1948, does contain evidence of segregation, why, then the opinion of the Court of Appeals is just sheer nonsense, because it says that they couldn't find any evidence of segregation.

The Court: Well, you say, assuming that it does contain that. Why would you have to assume it? If it is there, it either contains it or it doesn't.

Mr. Paul: Well, that is Mr. Robertson's assumption. It is not mine.

The Court: You mean you disagree over what is set forth on Page 148?

Mr. Paul: I disagree that it affects 1949. In other words, I agree with the Court of Appeals.

The Court: Well, then, as to case No. 6581-A, as I understand it, you disagree over whether these statutory steps, [42] relating to the preparation of the roll and presentation, must be taken. Isn't that the, isn't your disagreement limited to those, or to that question, rather? As I understand it, you two disagree over whether the statutory steps, relating to the preparation and presentation of the roll,

must be taken. In other words, you disagree over where the starting point is.

Mr. Robertson: I think we disagree as to that, and we also disagree as to the admissibility of this Dorothy Henry deposition, both in law and in fact, and of course I also still stand on my renewing my motion to vacate the order setting the trial on those same grounds.

The Court: Well, but what isn't clear to me is, assuming now that he was starting with another delinquent tax roll and he was about to take all the statutory steps or intended to take all the statutory steps, why would the deposition of Dorothy Henry or her testimony be inadmissible?

Mr. Robertson: Why what?

The Court: I say, why would her testimony be inadmissible?

Mr. Robertson: Well, because, after a delinquent tax roll is made up, and then they brought it in, then they couldn't testify——

The Court: Well, that is what I am trying to find out. You say it is inadmissible because it is subsequent to the preparation of the roll? [43]

Mr. Robertson: Yes, your Honor. The roll itself is conclusive.

Mr. Paul: I think the Court states our various disagreements. I wish to—I don't wish to give the Court the impression that I have abandoned my motion to strike portions of the objectors' testimony. There was quite a bit of testimony given about the valuation of property. The basis of the

motion is that the objectors did not appear before the Board of Equalization and offer evidence.

The Court: Well, now, let me understand this. I don't have a clear recollection of it. Your motion was to strike testimony given in what proceeding?

Mr. Paul: In No. 6581, the 1949 tax roll case.

The Court: And the testimony had been admitted by what; by stipulation, or what?

Mr. Paul: No. It just came in. I was not making any objection at that time, but in place of that I——

The Court: Well, by deposition or oral testimony?

Mr. Paul: Oral testimony.

The Court: Whose testimony was it?

Mr. Paul: Of the objectors. All of his witnesses.

The Court: Well, your point is that that should be stricken because it was not presented to the Board of Equalization. Is that it?

Mr. Paul: Not only that that evidence was not presented [44] but no evidence whatsoever was presented to the Board of Equalization, but only a naked claim.

The Court: That the valuations were excessive?

Mr. Paul: Yes. And the objectors having not exhausted their administrative remedy and there being no issue of fraud raised by the objectors, this Court has no power to modify——

The Court: Well, it wouldn't be of any particular importance anyhow because in these cases that are tried without a jury the Appellate Court con-

cerns itself with only one question, whether the evidence that was admissible is sufficient, not whether there was some inadmissible evidence also taken or admitted. It isn't of much importance one way or another.

Mr. Paul: Well, I understand your Honor's position. What I am in reality doing is raising a new legal issue. That is what I am doing. The new legal issue is that the objectors did not exhaust their administrative remedy, and, therefore, they have no standing before this Court at all.

The Court: You mean standing on some particular point or on the whole case?

Mr. Paul. On the whole case. They did not appear and present evidence to the Board of Equalization as they are required to do. Instead they just sent this letter, which is a bare, naked claim, and made no evidence themselves whatsoever. [45]

The Court: Well, but you could make that contention without any motion to strike.

Mr. Paul: Well, it is just one way of calling it to the Court's attention, is all.

Mr. Robertson: Well, I filed, out of an abundance of precaution, your Honor, I filed objections to that motion which is on file, your Honor, and of course under that theory, as I view it, why, if the Board valued the property over there at, assessed the property at a million dollars that was only worth a hundred thousand, if you didn't actually go in front of the Board personally, according to Mr. Paul's theory, why, there wouldn't be any fraud involved and it wouldn't be overvalued or overas-

sessed, and I submit that is not the law at all.

The Court: Well, but, if there was no complaint made before the Board of Equalization of excessive valuation, I should think that you would be precluded from making that point before the Court.

Mr. Robertson: It was made before the Board, your Honor, specifically made. In fact I was in contact with Mr. Paul, with a view here of two lawyers about it, too, and the city, I wrote letters to them about it. They knew that we claimed that it was excessive.

The Court: Well, then, the point boils down to this, that, while the objectors objected on the ground of excessive [46] valuation, they didn't produce testimony in support of it; is that your view?

Mr. Paul: They just said "the valuation is excessive and we believe it is this amount," a different amount. That is in essence what it amounted to.

Mr. Robertson: Well, his point entirely is that you necessarily have got to make an appearance before a common council in order to let them know that their valuation is excessive. We let the Board know. They were informed in writing, which is much better than orally.

The Court: Well, but his point is that you should have followed it up by submitting evidence of overvaluation.

Mr. Robertson: We did. We told them it was overvalued and everything else, your Honor.

The Court: Well, you told them it was overvalued, but did you follow it up by submitting evidence to prove that it was overvalued?

Mr. Robertson: Well, we submitted it the best way we could.

The Court: Well, did you submit it in the way you did before this Court?

Mr. Robertson: No; we didn't take any depositions and put over there or anything else. We filed our returns and also supported it and told them that it was overvalued.

The Court: Well, then, it seems to me that [47] the question becomes one of what obligation or duty rests on an objector before a board of equalization. That is the real question.

Mr. Paul: That is defined in the statutes and the ordinance, your Honor—two methods, either a personal appearance and testifying under oath or an appearance by affidavit, presenting evidence, not conflicting claims. All we got was the letter.

Mr. Robertson: That evades entirely the question that the delinquent tax roll is defective also. That is then evading the question of the effectiveness of the delinquent tax roll and of the illegal attempt to now cure it without any evidence and by counsel's coming in here and making what is no more than a letter as far as he is concerned. I don't think he is authorized to make that.

The Court: Well, it seems to me that there should be some authority on the question, where upon a reversal for a deficient tax roll, what the procedure should be.

Mr. Robertson: Well, I have not been able to find that particular thing, your Honor. I have

looked through everything, except I had some sections on Cooley on Taxation, but I haven't looked through it. As a matter of fact, I even had a hard time finding anything in the texts or anything else, the words "delinquent tax roll," but I finally located one where they used the words "delinquent tax roll," but I hunted [48] high and low even to find that any place.

The Court: Well, then, it looks like Yakutat is the only one that ever made that omission.

Mr. Robertson: I don't know where they got the law from. I wonder if we could leave those books here temporarily, Mr. Paul?

Mr. Paul: Well, they will notify me when they need them.

The Court: Well, then, as I understand it, counsel submit both cases on the statements that have been made here this morning and on the motions that——

Mr. Robertson: And on my briefs, your Honor.

The Court: ——have been filed, and objections.

Thereafter on the 29th day of June 1954, court having convened at 1:30 o'clock p.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

Mr. Robertson: In the objections to No. 6581-A, I feel, your Honor, that there is little that I can

add to the oral argument that I have heretofore submitted to the Court in these tax proceedings and also the written authorities, but I take the position, your Honor, for one thing, that whatever was held on the 24th of this month that—I admit I don't know [49] whether, if the Court considered it as having a hearing on the tax roll; I don't know whether you were having a hearing on the 1949 tax roll that was before this Court at the hearing in January, 1952, or for the supplemental, amended, duplicate delinquent tax roll that Mr. Paul himself submitted; but I submit that the record will show that I stated to the Court at the outset there that, if the Court overruled my motion to vacate the order shortening time, of May 11, 1954, and also my motion to suppress the Dorothy Henry deposition, that I would have to have time because I would have to have evidence and I wanted to introduce evidence to show that the City had not complied with either the statutory provisions of Sections 16-1-121 to 130, or in regard to the duplicate 1949 tax roll before the Court at the hearing in January, 1952, and have not complied with those sections or statutory provisions or with their own tax ordinances in regard to this purported, amended, supplemental, duplicate delinquent tax roll, and I think the record will show, that Miss Maynard's notes will show, that I made that statement to the Court at that time, when it came on, and the order of sale of course is going ahead on the theory that we had an entire hearing. I simply call that to the Court's attention.

Furthermore, this order of sale now is largely based, at least the Court said so, upon what I contend—I don't admit it is a defense, your Honor; I contend that this doesn't come [50] into that administrative board doctrine which Mr. Paul quoted to you from American Jurisprudence; and that, furthermore, the statute specifically provides in this case that the Court itself is the final arbiter of whether or not property is overassessed or overvalued for tax purposes. It doesn't make any difference whether we made any appearance before the Board; and that I didn't admit here that we didn't make any appearance of any kind before the Board. And with that I simply submit my written objections to it, your Honor, because I have argued so much on this and have had so many written briefs, and I don't see any reason to add to it.

The Court: Well, I can't agree that a taxpayer can come before the Court on a proceeding of this kind and make an objection as to valuation which he had not made to the Board of Equalization, so I will have to adhere to my former ruling, but, so far as this showing, or, rather, being given an opportunity to make the showing that you mentioned in the latest objection, as a matter of fact, I had forgotten that. It seems to me that you would be entitled to such an opportunity, but I am wondering whether you want merely to have the showing heretofore made considered as having been made on this later proceeding or whether you want to present something else than you have already presented in the way of objection. Now, if all you want to do

is to be given the opportunity to present the objection that you have done on the previous occasions, it [51] seems to me that you and counsel ought to be able to agree that the showing then made can be considered on this proceeding.

Mr. Robertson: Well, of course, if Mr. Paul admits the verity of my objections, not the validity of them but the verity of them, why, of course, that would serve the purpose; but I don't know just what—a person comes in—and I make objections, and, while there is no denial of the objections, so far as I know, other than Mr. Paul claims they are not valid, but, if they are admitted as a fact, then of course I would have all the evidence before you; but, as it is now, I have no evidence whatever that they didn't comply with the statute or the ordinances in regard to this amended, supplemental, duplicate delinquent tax roll that Mr. Paul prepared and signed on behalf of the City. I would have to take evidence or probably a deposition of, I presume, the City Clerk or somebody to prove that there wasn't any compliance, unless he admits it.

The Court: Well, then, as I understand it, the evidence you want to introduce in support of these latest objections is evidence that had not been previously introduced; is that it? If it has been previously introduced——

Mr. Robertson: I haven't had an opportunity to put in any evidence on that, your Honor.

The Court: But my question is whether, if all you [52] want to do is duplicate what has been

done before, I don't know why the Court couldn't consider it as evidence in this case.

Mr. Paul: As to that, your Honor, the evidence was introduced, your Honor. All evidence introduced in the previous case, except that relating to valuation, to which I filed a motion to strike, I regard as part of this case.

The Court: Well, let the record show then that the evidence heretofore introduced in support of objections such as are made on this particular proceedings upon the so-called supplemental or amended tax roll may be considered in support of objections presently made. That will serve your purpose, will it not?

Mr. Robertson: Yes. But I can't agree with the motion to strike the valuation. If the Court strikes from the printed record my valuations proved at the hearing in January, 1952, I can't come in here myself and prove that. I would have to take evidence of it, your Honor.

The Court: I don't quite understand you. What is it that you now say the Court has stricken?

Mr. Robertson: I don't say the Court has stricken anything, but Mr. Paul is referring to his motion, which I filed objections to, his motion to strike—of course he just made it to the printed record—but to strike that portion of the printed record in which I proved valuations.

The Court: You mean before the Court? [53]

Mr. Robertson: The January, 1952, hearing; yes, your Honor.

The Court: Well, I don't know that I granted any such motion.

Mr. Robertson: I say, I don't know whether your Honor has or not.

The Court: Well, I am sure I haven't.

Mr. Robertson: It is before the Court, and Mr. Paul argued here the other day. He argued in the form that I made objections to it, and then he was arguing against my objections to it.

The Court: I don't recall having made an order that would exclude that, and, if I have, why, I would—I will make a further order to vacate so much of that order as would exclude that evidence, and permit you to have it considered on this proceeding.

Mr. Robertson: Very well, your Honor.

Mr. Paul: Then how would that balance up with the Court's memorandum decision, which the Court, I think, in substance repeated here a few minutes ago, that evidence of valuation not presented to the Board cannot be considered by this Court?

The Court: Well, I don't see how that would be affected. The fact that the Court holds that some evidence is inadmissible in a proceeding doesn't preclude the appellant [54] from getting a review of it.

Mr. Paul: Well, naturally, your Honor, but—

The Court: Well, that is all, as I understand it, that he wants. He wants to urge the point that he introduced this evidence, such as it is, before the Board of Equalization and that my failure to con-

sider it was error. There is no reason why he shouldn't be allowed to a review of that.

Mr. Paul: Yes; that is correct. Now, we do not retreat from the position, your Honor, that the only request for a delay in producing evidence was based upon objections that the objectors made to the deposition of Dorothy Henry. The Court considered those objections in Yakutat—I mean, in Anchorage—and overruled the objections, and there was no stay that was granted to him to give him more time, and he should have been fully prepared to go to trial and produce all the records and all the evidence he wanted on June 24th. As I say, I am willing to accommodate counsel and let the entire record, but I don't—

The Court: Well, I don't pretend to remember the numerous objections and steps taken here but I do not recall that I ever intended to foreclose counsel from presenting or from obtaining time to present his particular evidence. But what difference does it make if he is allowed now by this latest ruling of the Court to have the evidence, previously introduced, considered on this hearing? It doesn't make any [55] difference.

Mr. Paul: I think I have accommodated counsel to the fullest extent on his evidence.

Mr. Robertson: As I understand, your Honor, it is now so considered by your Honor.

The Court: Yes.

Mr. Robertson: Very well.

Mr. Paul: Is the Court at this time signing the orders of sale?

The Court: Yes.

Mr. Robertson: I would like to ask, since the Court will probably be gone before I can get it, I would like to ask Mr. Paul about a supersedeas bond; in No. 6581-A I think a four-thousand-dollar bond would be sufficient, and in No. 6734-A a six-thousand-dollar bond.

Mr. Paul: That is satisfactory.

Mr. Robertson: Very well.

Thereafter on the 27th day of July, 1954, court having convened at 10:00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors not appearing; the following proceedings were had:

Mr. Paul: Now, with respect to the two Yakutat cases, No. 6581-A and No. 6734-A, I notice Mr. Robertson's motion for [56] a new trial in both were for 10:00 o'clock yesterday morning but because of the absence of the Court they were not heard.

The Court: I didn't know there was anything left in those cases.

Mr. Paul: Mr. Robertson informs me that his argument will be very short. I have agreed with him on the telephone to his date of 2:00 p.m., Wednesday. Would that be satisfactory with the Court?

The Court: That is tomorrow?

Mr. Paul: Yes.

The Court: Yes; that will be satisfactory.

Mr. Paul: Thank you. I will inform him.

Thereafter on the 28th day of July, 1954, court having convened at 2:00 o'clock p.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

The Clerk: The motion for new trial in the two Yakutat cases, No. 6581-A and No. 6734-A.

Mr. Robertson: Also with Mr. Paul's consent, your Honor, in No. 6581-A the objectors have a motion to amend the minute order of June 29, 1954, so to show that the objections which were stated in their motion of June 23, 1954, to strike applicant's amended duplicate delinquent tax roll for 1949, [57] dated June 23, 1954, were correct in fact but that the City doesn't admit either my legal conclusions in the objections or the validity of the objections, and Mr. Paul says he is agreeable to that minute order being so entered.

Mr. Paul: I am agreeable, your Honor.

The Court: Well, if you agree on it, the minute order may be amended accordingly.

Mr. Robertson: Now, your Honor, I can't see why we can't submit the motions in each of these two cases for new trial at one time. I don't see any necessity of arguing them differently. I admit—I know how expensive these appeals are, and I wish I thought I had some—could persuade your Honor that the grounds of my motions for new trial are correct, but I have nothing new to argue which I haven't heretofore submitted to your Honor either

orally or by brief, and without limiting myself in any manner I simply again state to your Honor, and your Honor in your very brief opinion or memorandum decision in No. 6734-A stated that the objectors' substantial rights were not affected, and I would like to again emphasize, as I say, without limiting or releasing or discharging my other objections, but I submit, your Honor, that on a special proceedings that a taxpayer's substantial rights are injured when the statutory provisions of such statute in such special proceedings are not followed, and with that I submit the motions, your [58] Honor.

The Court: Well, I don't know that I can tell—what statutory provision is it that you say was not complied with?

Mr. Robertson: Well, they appear in all my objections, your Honor, and Mr. Paul himself made up the supplemental—or what did he call it—the amended, supplemental, delinquent tax roll for 1950 and 1951. I claim there is no such statute at all, if my objections are correct. I contend, your Honor, it is very unfortunate that the City hasn't complied with this statute in any respect in either of these two cases, and I think I have reiterated that to your Honor so many times I realize your Honor is probably sick of hearing me tell about it, and of course I go right back to the original, one of the original bases of our objections in the 1948-1949 tax proceedings, that there was never any assessment made at all, never any assessment made since 1948 of any

kind, and I just simply have to stand, your Honor, on my—I just want to again emphasize that, your Honor, to show you my good faith in constantly bringing these things up before the Court.

The Court: Well, of course I can't see why you do it, because, no matter how many times you win, you are eventually going to be defeated.

Mr. Robertson: I don't think so, your Honor.

The Court: Well, you certainly are.

Mr. Robertson: I think your Honor made a serious [59] error there, your Honor.

The Court: So far as assessments are concerned, if that is a typical objection, it seems to be fairly well settled that the City doesn't have to go through the same procedure as in the case of an initial assessment, that they can adopt the assessments made from the first year with such changes as have occurred in the town, and so, if that is illustrative of the other point, why, I can't be influenced much by that point or the other.

Now, I know there have been a lot of irregularities here. There naturally would be. I never thought that Yakutat—I had grave doubts whether Yakutat could ever function as a municipality. The only reason that I allowed Yakutat to become incorporated was because of the failure of the Department of Justice to station a deputy marshal there, and they failed for ten or twelve years, and the people just appealed to me to allow them to incorporate to see if they couldn't bring about some order out of chaos there. I always was very much in doubt whether they could function as a municipality, and it seems

that they are having great difficulty, if perhaps they have not failed in incorporating. But, when you have a municipality of that kind, so-organized, it is bound to follow that they are not going to do any more than substantially comply with even what may be essential and jurisdictional. Have you anything to add? [60]

Mr. Paul: I think your Honor has ruled on these points already. I do want to assure the Court that Yakutat is running its schools up there, paying its bills, saving the Federal Government a great deal of money in that regard, and I think they are doing a good job.

The Court: Well, Mahoney is the one responsible for cutting out the marshal in Yakutat, Hoonah and Craig, and I have had nothing but trouble since. It was a very shortsighted policy in trying to economize on law enforcement. I have no patience with it. I don't know how anything could be more grievously wrong.

Mr. Paul: Yakutat has suffered in that regard. Still, the people, as far as they are concerned, have done the best they can for themselves with their own resources.

The Court: Well, in view of the fact that the motions for a new trial apparently present nothing new, they are denied.

Mr. Robertson: Your Honor, we agreed sometime ago that in No. 6581-A that the supersedeas bond could be four thousand dollars and in No. 6734-A six thousand dollars, and that, I presume,

was satisfactory both as to the supersedeas and the costs.

Mr. Paul: Yes. The supersedeas includes the costs.

The Court: Well, the record will so show.

Mr. Paul: May it please the Court, I notice [61] in looking over the official file, while the Court has indicated that the order of sale was signed on June 29, 1954, as a fact of the matter, the order has not actually been signed. Would your Honor please sign it now?

The Court: You mean it hasn't been signed yet?

Mr. Paul: No. At least I see a form of order of sale in there that has not been signed. Now, I might be in error but——

The Court: That is in which case?

Mr. Paul: In both cases, I think, your Honor. However, I can assist the Clerk in checking up on that.

Now, we have one further matter in these cases. I have submitted to the Court, and it is in the official file, a form of order of withdrawal of documents deposited with the Clerk. These consist of all the City's official records. I should like to have that signed so that the City can have its records back for purposes of operating its business. I have informed counsel of this and delivered him a form of the order. If counsel desires to examine the records at any future date, they will be available.

The Court: Is there any objection to that?

Mr. Robertson: Just so that in the event that I think it should become necessary in any manner to have these original records in connection with the appeal that the City will send them back over to the custody of the Clerk if I [62] request it.

Mr. Paul: We agree.

The Court: Well, that will be a matter of record here, his promise to do that.

Mr. Robertson: Very well.

Thereafter on the 30th day of July, 1954, court having convened at 10:00 o'clock a.m., at Juneau, Alaska; the Honorable George W. Folta, United States District Judge, presiding; the applicant appearing by William L. Paul, Jr., its attorney; the objectors appearing by R. E. Robertson, their attorney; the following proceedings were had:

Mr. Robertson: In No. 6581-A, In the Matter of the Delinquent Tax Roll of the City of Yakutat, and also in No. 6734-A, In the Matter of the Delinquent Tax Roll of the City of Yakutat, I have served and filed notice of appeal, your Honor, and present my supersedeas, the one for four thousand dollars and the other for six thousand dollars, and I have submitted them to Mr. Paul.

Mr. Paul: We have no objection to the form of the supersedeas bonds, your Honor.

The Court: And the sufficiency?

Mr. Paul: U.S.F. & G.?

The Court: It has to be both as to the form and the sufficiency.

Mr. Paul: We agree that the U.S.F. & G. is adequate. [63]

(End of Record.)

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled Court, do hereby certify?

That as such Official Court Reporter I reported the above-entitled cause, viz. In the Matter of the Delinquent Tax Roll of Real and Personal Property for the City of Yakutat, Alaska, for the Years 1948 and 1949, No. 6581-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 63, both inclusive, contain a full, true and correct transcript of all the foregoing proceedings on the dates herein mentioned in the above-entitled cause, to the best of my ability.

Witness, my signature this 2nd day of October, 1954.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed]: October 2, 1954. [64]

[Title of District Court and Cause.]

DOCKET ENTRIES

Jan. 3, 1952—Application filed.

Jan. 8, 1952—Objections of Libby, McNeill & Libby and Yakutat & Southern Railway filed.

Jan. 8, 1952—Amendatory Objections of Libby, McNeill & Libby and Yakutat & Southern Railway filed.

Jan. 11, 1952—Affidavit of City Clerk filed.

Jan. 18, 1952—Further Amendatory and Supplementary Objections of Libby, McNeill & Libby and Yakutat & Southern Railway filed.

Jan. 18, 1952 M/O—Hearing on application for Order to sell property for delinquent taxes—under advisement.

Jan. 18, 1952—Two plats showing Eastern boundary of the City of Yakutat were filed with Court for its information.

Jan. 30, 1952—Applicant's Brief filed.

Feb. 1, 1952—Notice of Hearing filed.

Feb. 1, 1952 M/O—Court ruled that the Objections of Libby, etc., were overruled (see Minute Order, Feb. 2nd).

Feb. 6, 1952—Objection to Findings and Conclusions filed.

Feb. 18, 1952—Applicant's Brief filed.

Feb. 18, 1952—Robertson mailed Brief to Anchorage Feb. 16.

Feb. 21, 1952—Affidavit & Affidavit of Andrew J. Humphrey filed.

Feb. 21, 1952—Affidavits in support of Petition for rehearing of objections filed.

Feb. 21, 1952—Motion to Strike filed.

March 6, 1952—Court's Opinion filed.

Feb. 29, 1952 At Anchorage M/O—Court denied Petition for rehearing.

March 14, 1952—Cost Bills filed.

April 25, 1952 M/O—Upon hearing of signing Findings, Conclusions and Judgment court took matter under advisement.

April 26, 1952 M/O—Court signed Findings of Fact, Conclusions of Law and Order of Sale behalf of City of Yakutat.

April 26, 1952—Order of Sale filed and entered.

April 26, 1952—Findings, Conclusions filed.

April 26, 1952 M/O—Upon request counsel for Objectors—supersedeas Bond set at \$3,500.00. No attorney fee allowed.

April 28, 1952—Objectors' Objections to cost requested by applicant filed.

April 28, 1952—Notice of Appeal to Court of Appeals under Rule 73(b) filed.

April 30, 1952—Notice and Supersedeas on Appeal filed.

April 30, 1952 M/O—Court signed "Approved and appeal & Order of sale stayed this 30th day of April, 1952.

May 1, 1952—Objectors' Petition filed.

May 16, 1952 M/O—Order signed Order granting Libby, McNeill, etc., extending time in which to docket appeal in U. S. Court of Appeals to and including July 15, 1952. Order filed and entered.

June 26, 1952—Designation of Record on Appeal filed.

June 26, 1952—Statement of Points filed.

July 10, 1952—File sent to Circuit Court of Appeals.

Oct. 8, 1952—Motion to file Mandate and for Judgment on Mandate.

Jan. 8, 1952—Court approved Mandate from Court of Appeals and ordered spread at length on records of this court—same filed and entered.

May 6, 1954—Objection to Form of Judgment filed.

May 7, 1954 M/O—Objections to form of Judgment on Mandate overruled. Judgment signed.

May 7, 1954—Judgment filed and entered.

May 10, 1954—Motion for trial filed (Plaintiff's).

May 11, 1954 M/O—After hearing on above motion court advised counsel to present order for notice and then set case for trial.

May 12, 1954—Applicant's Motion to Strike filed.

May 12, 1954 M/O—Court Signed Order shortening time to hear motion and set matter for June 24, 1954.

May 12, 1954—Order filed and entered.

May 13, 1954 M/O—Upon presentation Court signed Order denying applicant's objections to Judgment. Order filed and entered.

May 21, 1954—Objectors' objections to Notice, etc., filed.

May 25, 1954—Deposition of Dorothy Henry filed.

May 28, 1954—Notice of filing Deposition of Dorothy Henry filed.

May 28, 1954—Objectors' Motion to Vacate Order entitled Order Shortening time filed.

May 28, 1954—Order to Suppress Deposition of Dorothy Henry filed.

May 28, 1954—Objectors' Objections to Applicant's Motion dated May 12, to strike portions of printed appeal record filed.

May 29, 1954—Objectors' Amended Notice of Presentation of Motions to vacate Order "Order shortening time" filed.

June 1, 1954—Affidavit of service of Amended Notice filed.

June 4, 1954—Certified copy.

June 4, 1954—Objectors' Second Amended Notice of Motion to vacate order entitled "Order shortening time, etc."

June 5, 1954—Affidavit of Service of 2nd Amended Complaint filed.

June 7, 1954—Applicant's Consent to hearing at Anchorage & Brief filed.

June 8, 1954—Reporter's Transcript of Extract of Proceedings filed.

June 8, 1954—Reporter's Transcript of Proceedings May 11, 1954, filed.

June 8, 1954—Case file sent to Anchorage to Judge.

June 21, 1954—Objectors' demand for Production of Record-Tax Rolls, etc., filed.

June 21, 1954—Files numbered 1 through 11, inclusive, filed. Response to Demand for Production of Record filed June 21, 1954.

June 22, 1954—Response and Objections to Demand filed.

June 23, 1954—Amended Supplemental Delinquent Tax Roll for 1949 filed.

June 24, 1954—Motion to Strike Amended Supplemental Delinquent Tax Roll for 1949 filed.

June 24, 1954—Objectors' Renewal of Motions to vacate order shortening time—including Order setting proceedings for trial to suppress Dorothy Henry's Deposition.

June 24, 1954—Objections to taking Dorothy Henry's Deposition and Objections to Applicant's Motion to strike certain portions of printed record on appeal filed.

June 24, 1954 M/O—Hearing arguments on above motions. Court took matter under advisement.

June 25, 1954—Court's memo decision filed. Several motions of objectors should be denied and that application for an Order of Sale of the Objectors' property should be granted.

June 28, 1954—Objectors' objections to Order of Sale filed.

June 29, 1954 M/O—Hearing on objectors' objections to Order of Sale—following which Court signed Order of Sale—it was stipulated that the amount of the supersedeas Bond be fixed at \$4,000.00.

June 29, 1954—Above Order filed and entered.

June 30, 1954—Reporter's Transcript of Proceedings of June 11, 1954 filed.

July 1, 1954—Deft's motion to amend or alter minute Order filed.

July 2, 1954—Motion for new trial filed.

July 6, 1954—Affidavit of Service by Mail filed.

July 15, 1954—Applicant's Notice of Attorney's Claim of Lien filed.

July 21, 1954—Notice of Hearing by applicant on Objectors' Motion for new trial filed.

July 27, 1954 M/O—Hearing on Motion for new trial in above July 27, 1954 Case set for 2 p.m., Wednesday, July 28th.

July 28, 1954 M/O—Objectors' Motion to amend M/O of June 30, 1954 filed.

July 28, 1954—Objectors' Motion for new trial denied.

July 30, 1954—Notice of Appeal to U. S. Court of Appeals for 9th Circuit under Rule 73(b) filed.

July 30, 1954—Supersedeas on Appeal filed.

July 30, 1954 M/O—Court approved and appeal allowed. Order of sale stayed this 30th day of July.

July 30, 1954—Order filed and entered.

Sept. 3, 1954—Order extending time to docket Appeal filed.

Aug. 31, 1954—Court signed Order extending time for filing appeal until Oct. 10, 1954.

Aug. 31, 1954—Order extending time to file and docket appeal filed and entered.

Oct. 2, 1954—Reporter's Transcript filed.

Oct. 4, 1954—Praecipe for Appeal Record filed.

Oct. 6, 1954—Motion for Order extending time to file and docket appeal filed.

· Oct. 6, 1954 M/O—Upon consideration of above the Court signed Order.

Oct. 6, 1954—Order extending Time to file and Docket Appeal filed and entered.

[Title of District Court and Cause.]

United States of America,
Territory of Alaska,
Division Number One—ss.

CLERK'S CERTIFICATE

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 21st day of October, 1954.

J. W. LEIVERS,

Clerk of the District Court.

By /s/ P. D. E. McIVER,

Chief Deputy Clerk.

[Endorsed]: No. 14562. United States Court of Appeals for the Ninth Circuit. Libby, McNeill & Libby, a corporation and Yakutat & Southern Railway, a corporation, Appellant, vs. The City of Yakutat, Alaska, Appellee. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed October 25, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals for the
Ninth Circuit

No. 14,562

LIBBY, McNEILL & LIBBY, a Corporation, and
YAKUTAT & SOUTHERN RAILWAY, a
Corporation,

Appellants,

vs.

CITY OF YAKUTAT, ALASKA,

Appellee.

APPELLANTS' STATEMENT OF POINTS

1. The trial Court did not give Appellants a fair, impartial trial or hearing and did not accord them due process of law or a fair opportunity to present their case as stated in their written Objections, dated September 25, 1951; January 8, 1952, and January 17, 1952, or otherwise, and, notwithstanding it found that the Applicant had committed irregularities in the proceedings (Minute Order of April 26, 1952, Journal 20, p. 419), based the entry of its Order of Sale, Findings of Fact, and Conclusions of Law, solely, as Appellants contend, upon the ex parte Application, with its attached notices and proof of publication thereof, and the verified affidavit of City Clerk Williams, dated January 7, 1952, and refused to and did not consider the verified affidavits, offered by Appellants, of Andrew J. Humphrey, dated February 13, 1952, and of Andrew J. Humphrey and Earl J. Fleming, dated February 13, 1952, and did not allow Appellants,

or afford them a fair opportunity, to adduce any evidence whatsoever, and did not consider, or, if it did it did so without Appellants' knowledge, give proper or any consideration or weight to the evidence that had been adduced between the same parties in cause No. 6302-A, which evidence and said Humphrey and Fleming affidavits conclusively showed that no assessment was ever made of Appellants' properties or city tax assessor appointed for the tax year commencing June 1, 1949, and that the full and true value of all of their properties for that tax year was \$137,500.00.

2. The trial Court, notwithstanding no assessment was ever made, nor did the Applicant appoint a tax assessor, for the tax year commencing June 1, 1949, by its Order of Sale and Findings of Fact and Conclusions of Law, in effect found, without being based upon any competent or sufficient evidence, that Appellants' properties were of a tax assessment valuation of \$283,630.00, notwithstanding their true and full value was \$137,500.00.

3. The trial Court in effect unlawfully appointed and constituted itself the assessor for the Applicant for the tax year commencing June 1, 1949, and assessed Appellants' properties at \$283,630.00.

4. The trial Court erroneously overruled Appellants' objections, dated January 17, 1952, notwithstanding those Objections were true and valid.

5. The trial Court entirely ignored Appellants'

objections, dated September 25, 1951, and January 8, 1952, and erroneously overruled them as well as Appellants' objections, dated January 17, 1952, notwithstanding Appellants offered to prove them and could have proved them as shown by the verified affidavits of Andrew J. Humphrey, dated February 13, 1952, and of Andrew J. Humphrey and Earl J. Fleming, dated February 13, 1952, and the evidence adduced in cause No. 6302-A.

6. The trial Court erroneously rejected all of Appellants' proposed Findings of Fact and Conclusions of Law, notwithstanding Appellants' Objections, dated September 25, 1951; January 8, 1952, and January 17, 1952, as well as notwithstanding Appellants' Objections, dated February 6, 1952, to Applicant's Proposed Findings, Conclusions and Order of Sale, and further notwithstanding Appellants could and would have proved and, if the Court considered the evidence adduced in Cause No. 6302-A, did prove that their said Findings of Fact and Conclusions of Law were properly allowable under that evidence, and, notwithstanding that such proof could have been made was also shown by said affidavits of Andrew J. Humphrey, dated February 13, 1952, and of Andrew J. Humphrey and Earl J. Fleming, dated February 13, 1952.

7. The trial Court erroneously applied in this proceedings the procedure provided by Sections 16-1-121 to 16-1-130, ACLA 1949, to both real and personal property, notwithstanding that procedure

is not applicable to personalty and notwithstanding that no means exist of segregating realty from personalty or vice versa, for sale or other purposes in this proceedings.

8. The trial Court erred in holding that assessment in a lump sum could be validly made of Appellants' separate properties, without segregation of ownership or of realty from personalty.

9. There was no competent or sufficient evidence upon which to base the Court's finding, viz.: "The assessment and levy of the said taxes, penalty and interest and costs and the fact that the same are unpaid was regular and legal as well as all proceedings subsequent thereto to the extent of not affecting the substantial rights of the objectors," and said finding is clearly erroneous because of no evidence upon which to base it.

10. There was no competent or sufficient evidence upon which to base the Court's finding, viz.: "The assessment on said property was fairly made and equalized according to law, the taxes, penalty and interest and costs duly levied and not paid when due and due notice given of this hearing as provided by law, at least to the extent as not to affect the substantial rights of the objectors," and said finding is clearly erroneous because of no evidence upon which to base it.

11. There was no competent or sufficient evidence upon which to base the Court's finding, viz.: "The said taxes, costs, interest and penalties consti-

tute a lien against the respective property mentioned and set forth in said duplicate delinquent tax roll," and said finding is clearly erroneous because of no evidence upon which to base it.

12. The tax assessment for the tax year commencing June 1, 1949, was neither fairly made nor equalized according to law; in fact, no assessment was made.

13. The tax for the year commencing June 1, 1949, was not duly levied; in fact, no tax was levied.

14. The trustees for Applicant, as required by Section 16-1-122, ACLA 1949, or otherwise, did not designate the officer who should give the notice upon which its Application herein is based, direct the publication of that notice, designate the newspaper in which that notice should be published, or do or perform, as a board of trustees, those or any other requirements of said Section, nor did they cause said notice to be published once a week for four successive weeks ending not less than 30 days prior to the date on which the notice stated said Application would be presented.

15. The judgment applied as a credit upon Appellee's claimed taxes at its claimed valuations the \$719.94 costs allowed against Appellee by this Honorable Court in its Mandate of August 19, 1953.

16. The judgment or order of sale is based upon a purported duplicate delinquent tax roll which was prepared by Appellee's attorney and in entire dis-

regard of Sections 16-1-121 through 16-1-126, ACLA 1949, and the municipal ordinances.

17. The rule of law laid down by this Honorable Court in this cause, announced in its written Opinion of July 17, 1953 (reported 206 F. 2d 612), which Opinion and this Honorable Court's Mandate, issued in accordance therewith on August 19, 1953, are res judicata herein and the law of this cause.

18. The preponderance of the evidence proved that Appellants' properties were overvalued and overassessed for each of the tax years 1948 and 1949 and were of the true and full value during those two years as claimed by Appellants, and for neither of those years were the taxes on Appellants' properties fairly assessed or equalized.

19. Appellee did not prove, nor did the trial Court require Appellee to prove, that it had done any of the jurisdictional acts required in these special proceedings by Sections 16-1-121 through 16-1-126, ACLA 1949, in that Appellee's trustees did not officially designate the city assessor or other official to give the notice required by Section 16-1-122, officially direct either the publishing or posting of that notice, officially designate the place where or the date when the application would be made, or officially designate the dates and period either of publishing or posting that notice.

20. Notice of presentation of the duplicate delinquent tax roll was neither published nor posted

as required by either the law or the municipal ordinances.

21. The judgment allowed interest upon penalty, notwithstanding the municipal ordinances did not require or provide for the payment of interest upon penalty.

22. The duplicate delinquent tax roll, Exhibit 1, did not segregate taxes upon personalty from those upon realty or segregate the ownership of either personalty or realty, and affords no means of computing taxes upon the two classes of property or as to the two different ownerships.

23. Aliunde evidence admitted, i.e.: Dorothy Henry's deposition and page 5 of purported assessment book, Exhibit 2, to modify, amend, and alter the duplicate delinquent tax roll, Exhibit 1.

24. Computation of segregated taxes upon personalty and realty was based upon aliunde evidence, i.e.: Dorothy Henry's deposition and page 5 of purported assessment book, Exhibit 2, not upon the duplicate delinquent tax roll, Exhibit 1.

25. The judgment allowed an attorney's fee contrary to law.

26. Payments made by the respective Appellants in full of their respective taxes at the true and full value thereof, which payments were received, retained, and not returned by Appellee, were applied contrary to Appellants' instructions which accompanied the payments in such manner as to satisfy

the personal property taxes at Appellee's claimed valuations and to leave unsatisfied the real property taxes at Appellee's claimed valuations.

Dated at Juneau, Alaska, October 22, 1954.

/s/ R. E. ROBERTSON,

Of Attorneys for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 25, 1954.

[Title of Court of Appeals and Cause.]

DESIGNATION OF CONTENTS
OF RECORD ON APPEAL

Appellants hereby designate for inclusion in the record herein the District Court's complete record as appearing in the Printed Record heretofore before this Honorable Court and upon which it based its Opinion of July 18, 1953, without reprinting of that record if such is permissible under this Honorable Court's rulings, and still can be considered upon the Appeal, and all proceedings in the District Court subsequent to this Honorable Court's issuing its Mandate on August 19, 1953, including the Reporter's complete transcript of October 2, 1954, all exhibits, all minute orders, all docket entries, also Reporter's transcript entitled in Cause No. 6734-A and dated June 4, 1954, but omitting duplication

of Reporter's transcript of June 11, 1954, omitting Appellee's undated and undesignated memo of authorities, Notice of Attorney's claim of lien, Affidavit in Support of Motion to Suppress Resolution and Resolution, Order permitting withdrawal of Exhibits, and Praecipe filed in District Court for Appeal Record.

Dated at Juneau, Alaska, October 22, 1954.

/s/ R. E. ROBERTSON,

Of Attorneys for Appellants.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 25, 1954.

No. 14,562

IN THE

United States Court of Appeals
For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation)
and YAKUTAT & SOUTHERN
RAILWAY (a corporation),

Appellants,

VS.

CITY OF YAKUTAT, ALASKA (a municipal
corporation),

Appellee.

BRIEF FOR APPELLANTS.

R. E. ROBERTSON,

ROBERTSON, MONAGLE & EASTAUGH,

P. O. Box 1211, Juneau, Alaska,

Attorneys for Appellants.

FILED

MAR - 9 1953

PAUL P. O'BRIEN
CLERK

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NB: For the Court's convenience and inasmuch as the trial Court said it would consider all the evidence before it in Case No. 13,455 (Volume 1 PR herein; lower Court No. 6561-A), Appellants here reprint their Subject Index in their main brief in Case No. 13,455.

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No. 14,562

IN THE

United States Court of Appeals
For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation) and YAKUTAT & SOUTHERN RAILWAY (a corporation),

Appellants,

vs.

CITY OF YAKUTAT, ALASKA (a municipal corporation),

Appellee.

BRIEF FOR APPELLANTS.

Appellants contend that this is the identical proceedings that was before this Honorable Court in its Case No. 13,455 plus such further errors as the trial Court committed since this Court issued its Mandate (PR 335-337) on August 19, 1953, and that the same facts and legal principles are involved plus such additional facts and legal principles as are involved in those further errors.

Inasmuch as the Clerk on January 27, 1955, informed Appellants that the Court had granted their petition to use and adopt herein their brief in Case

No. 13,455, they hereby do so as a supplement or appendix hereto and, to save space, will refer thereto as Bf. 13,455, p. so and so. The Transcript of Record in Case No. 13,455 is identical with Volume I of the Transcript of Record herein. Volume II of the Transcript of Record herein embraces the proceedings, commencing with this Court's Mandate (PR 335-337) of August 19, 1953, in Case No. 13,455 up to the docketing of this appeal. The parties are the same.

STATEMENT OF PLEADINGS AND FACTS.

A. Jurisdictional Statutes.

See: Bf. 13,455, pp. 1-22.

B. Pleadings.

See: Bf. 13,455, pp. 22-36, for pleadings before this Court on first appeal upon the basis of which the trial Court entered the "Order of Sale" (PR 50) of April 25, 1952, which this Court reversed by its Opinion of July 8, 1953 (206 F2d 612), and which pleadings supplemented by the further hereinafter mentioned pleadings were again before the trial Court on June 24, 1954, resulting in entry of the "Order of Sale" (PR 388-389) of June 29, 1954, from which this appeal is taken.

C. Proceedings subsequent to this Court's Mandate of August 19, 1953, in Case No. 13,455 (PR 335-337).

Under date of October 7, 1953, Appellants moved to file, and for judgment on, this Court's mandate of August 19, 1953 (PR 337-338).

On January 8, 1954 (PR 408), the trial Court said the motion was granted.

On April 28, 1954, Appellants reminded (PR 409) the trial Court that it had not signed the judgment on the mandate, whereupon Appellee, at its request, was given time to file objections to the judgment on the mandate. Its counsel stated: "We have taken the money we have gotten and applied it to the personal property taxes and also gave him credit for his costs" and admitted Appellants had protested strongly against that procedure (PR 411).

Appellee filed its objections on May 6, 1954, to Appellants' proposed judgment on the mandate (PR 340).

On May 12, 1954, nunc pro tunc May 8, 1954, the trial Court overruled Appellee's objections to entry of judgment on the mandate, saying that the costs taxed by this Honorable Court could not be applied or credited by Appellee upon the taxes, personalty or realty, penalty and interest, or any part thereof, which Appellee claimed were due it from Appellants (PR 342-343).

On May 8, 1954, the trial Court entered judgment on this Court's mandate (PR 339).

On May 10, 1954, Appellee moved that this proceedings be set down for hearing on May 11, 1954, or that the evidence of the City Clerk be preserved (PR 340-341), at which time Appellants in open Court contended this Honorable Court's mandate (PR 335-337) in Its Cause No. 13,455 was final (PR 413).

Over Appellants' objections (PR 415-421) the trial Court on May 11, 1954, set this proceedings for rehearing on June 24, 1954 (Sup. PR 350a).

On May 12, 1954, Appellee served and filed its motion (PR 341-342) to suppress certain parts of the printed record in this Court's Case No. 13,455, and gave written notice of taking on written interrogatories the deposition of Dorothy Henry on May 24, 1954, in Yakutat (PR 345).

On May 21, 1954, Appellants served and filed their written Objections to that notice and to Appellee's written interrogatories (PR 343-344).

Without awaiting the trial Court to rule on those Objections, Appellee took Dorothy Henry's deposition (PR 345-350) producing a document (PR 347) on its face entitled "City of Yakutat Tax and Assessment Roll No. 5" whose defects will be later pointed out (*Infra*, pp. 21-26).

On May 25, 1954, filed Dorothy Henry's deposition with the Clerk of the trial Court and on May 26, 1954, mailed Appellants' attorney a notice of such filing, which notice Appellants received on May 28, 1954 (PR 350).

On May 28, 1954, Appellants served and filed their motion (PR 355-356) to suppress Dorothy Henry's deposition (PR 345), and their Objections (PR 357-359) to Appellee's Motion (PR 341-342) to strike certain portions of the printed record of this Court's Case No. 13,455, and their Motion (PR 351-353) to vacate the trial Court's order, entitled "Order Short-

ening Time,” of May 11, 1954, setting this proceeding for new trial on June 24, 1954 (Sup. PR 350a).

Judge Folta then holding Court in Anchorage, on May 29, 1954, Appellants gave notice (PR 359-360) that they would present in Anchorage on June 4, 1954, their Motion (PR 351-353) to vacate order entitled “Order Shortening Time” (Sup. PR 350a), and their Objections to Appellee’s Motion (PR 357-359) to strike certain portions of the printed record of this Court’s Cause No. 13,455, and their motion (PR 355-356) to suppress Dorothy Henry’s deposition, and their Objections (PR 343-344) to Appellee’s notice of taking, and its written interrogatories in, Dorothy Henry’s deposition.

Appellants, then having learned that neither Judges Folta nor McCarrey were in Anchorage, and that Judge Pratt would not hear motions in Fairbanks prior to June 11, 1954, served and filed their amended notice (PR 362-364) that they would present their said Motions and Objections to Judge Folta or to such District Judge as was in Anchorage on June 10, 1954, or as soon thereafter as a judge was there available.

Attorney Raymond E. Plummer, on behalf of Appellants, presented their said Motions and Objections to Judge Folta on June 11, 1954, (PR 424-434), resulting in his entering a minute order on June 12, 1953, viz.:

The Appellants’ “several motions are denied without prejudice to a renewal thereof upon failure of the applicant to present a new duplicate delinquent tax roll on or before June 24.” (PR 365.)

On June 23, 1954 (PR 371-379), Appellants renewed their several motions and objections, and while preparing that Renewal were served with Appellee's pretended "Amended Supplemental Delinquent Tax Roll for 1949" (PR 369-370), which Appellants immediately moved to strike (PR 379-381), and which was certified and signed in the name of the City Clerk by its Municipal Attorney and which was dated June 23, 1954, the day before the new trial started, all of which motions and objections Appellants submitted to the trial Court on June 24, 1954, and objected to its jurisdiction to retry this proceeding (PR 435), at which hearing Appellee's counsel stated that he was raising a new legal issue, i.e.: "The new legal issue is that" Appellants "did not exhaust their administrative remedy, and, therefore, have no standing before this Court at all;" (PR 449) at which hearing the Court took into consideration all of the record (Minute Order, June 29, 1954 (PR 406, also 456), shown in this Court's Case No. 13,455, Appellee's Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), Dorothy Henry's deposition with document, Exhibit 2, which she said was a true copy of the Appellee's Assessment Books and Tax Roll (PR 345-350) and all of Appellants' several motions and objections (PR 435) previously submitted to Judge Folta on June 11, 1954, in Anchorage (PR 424-434, also 456, 458).

On June 25, 1954, the learned trial Court filed its written Memorandum Decision (PR 382), whereupon Appellants served and filed their Objections to Order

of Sale (PR 384-387), but on June 29, 1954, the trial Court entered its Order of Sale (PR 388-389).

On July 2, 1954, Appellants served and filed their Motion for New Trial (PR 390-394).

On July 28, 1954, in open Court Appellee's counsel admitted, in accordance with Appellants' Motion to Amend or Alter the Minute Order of June 29, 1954 (PR 390), that Appellants' objections, stated in their motion (PR 379-380) of June 23, 1954, to strike Appellee's Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), were correct in fact, but that Appellee didn't admit Appellants' legal conclusions in those objections or the validity of the objections (PR 460).

On July 28, 1954, the trial Court denied Appellants' Motion for New Trial (PR 463).

On July 30, 1954, Appellants served and filed their Notice of Appeal (PR 395-396) from the Order of Sale of June 29, 1954 (PR 388-389) and from the order made on July 28, 1954, denying their Motion for New Trial (PR 463).

Appellants filed their Supersedeas on July 30, 1954, which was approved and appeal allowed and order of sale stayed on that date by the trial Court (PR 396-399).

Appellants docketed their appeal with the Clerk of this Court on October 25, 1954, the time having been extended, because of the absence of or business pressure on the Official Court Reporter, by the trial

Court's orders of August 31, 1954, (PR 400) and October 6, 1954, until October 28, 1954 (PR 401-402).

FACTS.

See: Bf. 13,455, pp. 36-49, for Facts involved in first appeal, which facts were again before the trial Court, together with the further hereinafter mentioned facts, at the hearing on June 24, 1954.

Further Facts Before Trial Court at Hearing on June 24, 1954.

At the retrial on June 24, 1954, the trial Court considered all the evidence introduced in support of the Appellants' objections (PR 456, 458) which was before this Court in Case No. 13,455, so the only new matters, other than Appellants' Motions and Objections in Volume II Transcript of Record herein (pp. 4-6, *supra*), were: (a) City Clerk Henry's testimony by deposition (PR 345-350), including a document (PR 347) which she termed to be a true copy of Appellee's assessment book; (b) Appellee's pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370); and the admission by Appellee (PR 460) of the correctness of the facts, but not of any legal conclusions or the validity of the objections stated in Appellants' Motion to Strike (PR 379-381) said pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), which motion epitomized is: that said pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370)

was not prepared, presented, authorized, or noticed in accordance to, and did not in any manner comply with, the statutory provisions of Sections 16-1-121 through 130, ACLA 1949, or Appellee's tax ordinances, and was not a new duplicate delinquent tax roll for 1949 in any manner conforming with either said statutes or ordinances, nor was any notice published or posted for any period of time whatsoever of its presentation to the trial Court nor was any application filed for an order of sale thereon, and William L. Paul, Jr., neither as municipal attorney nor otherwise, had any authority under said statutes or ordinances, or otherwise, to prepare, present, or sign it, and Appellee's tax ordinances contained no provision for the payment of 1% or any other interest upon the claimed or any alleged delinquent taxes, and that the trial Court was without authority or jurisdiction to entertain or consider said Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) or to permit in any manner either by aliunde evidence or otherwise amendment or modification of the duplicate delinquent tax roll (PR 10, 13) that was before it when it entered its Order of Sale of April 25, 1952 (PR 50), and that neither Sec. 16-1-122, ACLA 1949, nor any other statute authorized or empowered Appellee or its Board of Trustees to make up or present an amended supplemental tax roll, and Appellee's tax ordinances did not provide that the Clerk or any other official should make up and present an amended supplemental tax roll for 1949 or any other year, and neither Sec. 16-1-122, ACLA 1949, nor any other

statute authorized or empowered Appellee to make up or present an amended supplemental tax roll for any tax year after the duplicate delinquent roll for that year had been made and presented to the trial Court with an application for sale, or authorized or empowered Appellee to present to the trial Court for an order of sale an application, as in this proceeding, which application was made more than 3 years prior to the purported amended supplemental tax roll (PR 369-370), (whose purported taxes, penalty and interest are sought to be made a lien upon Appellant Yakutat & Southern Railway's real property), nor was Appellee's corporate seal affixed to the purported amended supplemental tax roll (PR 369-370), nor was it endorsed under the hand of the Clerk (inadvertently in their Motion Appellants said "Court" instead of "City"), nor was its original filed or on file with the City Clerk, nor was proof made of either publishing or posting any notice of application to the trial Court for an order of sale on the purported amended supplemental tax roll (PR 369-370).

All of these admitted facts show noncompliance not only with Sections 16-1-122 and 123, ACLA 1949, but also with Appellee's Tax Ordinances, Exhibits A and B (PR 85-104).

The pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) claims delinquent real property taxes alone of \$1,988.29, whereas the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court in its Opinion (206

F2d 612) of July 8, 1953, held to be invalid, claimed delinquent combined real and personal property taxes of \$1,909.38, or \$78.91 less than what is now claimed for real property taxes alone.

The pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) like the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), makes no segregation of ownership, but assessed the real property against both Appellants, in the assessed amount of \$193,695.00, whereas on the document (PR 347), produced by witness Henry, in a column headed "Board", without any dollar sign, "11,000" appears on the same line as "Land" and "176,625" appears on the same line as "Improvements". 11,000 plus 176,625 make "187,625", not "\$193,695.00".

On that document are no figures for the year 1949 in the Column headed "Assessor's", clearly showing that the pretended assessment was not made by the Assessor, but if at all by Appellee's the Board of Trustees. Sections 2, 3, 4, and 5, Appellee's Tax Ordinance, Exhibit A (PR 85-88), created the office and prescribed the duties of Assessor, and Section 3 (PR 86) specifically prescribed that the Assessor should make the assessment, and was in effect during the tax year 1949 according to Appellee's Complaint in Cause No. 6302-A (PR 81, 82, 83). Moreover, at the January 18, 1952, hearing Appellee's witness Mallott testified Appellee had an assessor for 1949 (PR 223). No evidence as adduced of any contrary Ordinance, or even Resolution. This honorable Court's Case No. 14,561, shows that Appellee's counsel admitted

that that Ordinance was still in effect during 1949, 1950, and 1951 (PR Case No. 14,561, pp. 245, 246). Nor was any evidence adduced that any assessor swore that the assessment contained a full, true and correct, or any, assessment of any taxable property as prescribed by Sec. 4, Appellee's Tax Ordinance (PR 87), nor of any notice given to Appellants that Appellant Yakutat & Southern Railway's real property had been assessed at a valuation of \$193,695.00 (PR 369).

QUESTIONS PRESENTED.

Appellants contend that this Appeal presents the same three questions (See Bf. 13,455, pp. 49-50) as the first Appeal presented in their Points 1-14 (PR 320-323; 475-479) plus, to cover the further errors committed by the trial Court and Appellants' further Points 15-26 (PR 479-482), three further questions, and that the first three questions (Bf. 13,455, pp. 49-50) apply with equal, if not greater force, not only to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) as they did to the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) but also to the Order of Sale (PR 388-389) of June 29, 1954, as they did to the Order of Sale (PR 50-51) of April 25, 1952, which this Honorable Court reversed by its Opinion of July 8, 1953 (206 F2d 612).

FURTHER QUESTIONS PRESENTED.

Fourth—Appellee's witness Henry's testimony, with its documentary evidence (PR 345-350), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by either the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held was invalid in its Opinion of July 8, 1953 (206 F2d 612), or the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370, upon which the trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954.

Fifth—The trial Court was without jurisdiction to try this proceeding de novo, and this Honorable Court's Mandate (PR 335-337) of August 19, 1953, issued in Case No. 13,455, and the trial Court's judgment on Mandate (PR 339) of May 8, 1954, were res judicata and this Honorable Court's Opinion of July 8, 1953, (206 F2d 612) is the law of the case.

Sixth—The Order of Sale (PR 388-389) of June 29, 1954, erroneously allowed interest on claimed delinquent taxes although Appellee's Tax Ordinances fixed no rate of interest payable thereon; erroneously allowed Appellee an attorney fee contrary to law and despite the trial Court again found Appellee had committed "a lot of irregularities" (PR 462); erroneously credited upon Appellee's claimed taxes at its claimed valuations the \$719.94 allowed as costs to Appellants in this Honorable Court's Mandate of August 19, 1953 (PR 335-337); and applied, contrary to Appellants'

instructions when paying them, Appellants' payments of \$1751.75 on December 10, 1949, in such manner as to satisfy Appellee's claimed taxes at its claimed values of personal property and to leave unsatisfied Appellee's claimed taxes at its claimed value of Appellant Yakutat & Southern Railway's realty, which payments were received, collected, retained and not refunded by Appellee.

ARGUMENT.

FIRST PROPOSITION.

APPELLANTS WERE NOT GIVEN A FAIR, IMPARTIAL HEARING OR TRIAL OR ACCORDED DUE PROCESS OF LAW OR FAIR OPPORTUNITY TO PRESENT THEIR OBJECTIONS AND ADDUCE THEIR EVIDENCE AT EITHER THE JANUARY 12, 1952, TRIAL OR THE JUNE 24, 1954, TRIAL (Points 1, 2, 6, 9, 10, 11, PR 475-478).

Appellants adopt their argument in the first Appeal on the First Proposition (Bf. 13,455, pp. 51-63) all of which they submit necessarily affected the outcome of the hearing on June 24, 1954, and resultant "Order of Sale" (PR 388-389) of June 29, 1954.

Hearing of June 24, 1954.

Relying upon the trial Court's minute order of June 12, 1953 (PR 365), made in Anchorage, that Appellants, if Appellee did not present a new duplicate delinquent tax roll, could renew without prejudice their several motions against a new trial (PR 351-353) and their Objections against taking (PR 343-344) and to suppress (PR 355-356) Dorothy Henry's

deposition (PR 345-350) with its documentary evidence, and their Objections to Appellee's Motion to strike portions of the printed Appeal Record in No. 13,455 (PR 357-359), Appellants, in the absence of service of notice of or application for, or presentation of, a new duplicate delinquent tax roll, could not foresee the necessity of obtaining any further evidence for the hearing on June 24, 1954, even should the trial Court hold it, because the minute order of June 12, 1954 (PR 365), clearly indicated that unless Appellee presented a new duplicate delinquent tax roll no such further hearing would be held; in fact, the Court in its Opinion (PR 382) of June 25, 1954, said that it had "expressed the opinion that the roll found deficient in the respect pointed out by" this Honorable Court "could not be amended and that a new proceeding would have to be initiated, . . ." Nor did Appellee ever serve or present a new duplicate delinquent tax roll other than the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), and it was not served until June 23, 1954, too late for Appellants to obtain any new evidence even had that pretended Amended Supplemental Delinquent Tax Roll for 1949 been, which it was not, made up, noticed, original filed with City Clerk, applied for, and presented as required by Sections 16-1-122 and 123, ACLA 1949, and by Section 17, Appellee's Ordinance No. 1 (PR 98-100). In the entire proceedings the only application is that of January 3, 1951 (PR 1-2) and the only notice that of August 10, 1951 (PR 9-11; 12-14), used in presenting the Supplemental

Duplicate Delinquent Tax Roll (PR 10, 13) which was held invalid in this Honorable Court's Opinion (206 F2d 612) on July 8, 1953.

Furthermore, Appellants submit they had a right to rely upon Appellee's irregularities and failure to comply with the statute which they had repeatedly called to the trial Court's attention in the proceedings both prior and subsequent to their first appeal, of which irregularities the trial Court must have known inasmuch as it said in its Opinion (PR 383) filed June 25, 1954, "* * *, even though the procedure now adopted by the City may be somewhat irregular" and in open Court on July 28, 1954 (PR 462), "I know there have been a lot of irregularities here", having previously, prior to the first appeal, in its Minute Order of April 26, 1952 (PR 30), said "No attorney fee was allowed because of irregularities on the part of Yakutat of the kind that encourage litigation".

Appellants stated their need for further time to adduce evidence in open Court on June 24, 1954 (PR 436) and an opportunity to make defense to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) in their Objections (PR 384) of June 28, 1954, to entry of the Order of Sale of June 29, 1954.

Appellants submit that the Order of Sale (PR 50-51) of April 25, 1952, and the Order of Sale (PR 388-389) of June 29, 1954, were each entered without due process of law, which Daniel Webster defined as:

"A law which hears before it condemns; which proceeds upon inquiry, and renders judgment only

upon trial. The meaning is that every citizen shall hold his life, liberty, property and immunities, under the protection of the general rules which govern society.”

Ex parte Wall, 107 US 265, 27 L. ed. 552, 562.

Appellants submit that they hold their property under the protection of the law prescribing the necessary statutory procedure in these proceedings, and that they have been deprived of that protection and were thereby condemned without hearing, and that the trial Court did not proceed upon inquiry, but rendered judgment without such a trial as the protection of the statutory procedure should have afforded them. The Court in open Court warned Appellant’s counsel: “Well, of course, I can’t see why you do it, because no matter how many times you win, you are eventually going to be defeated.” Mr. Robertson: “I don’t think so, your Honor.” The Court: “Well, you certainly are.” Mr. Robertson: “I think your Honor made a serious error there” (PR 462).

Appellants don’t think they merited the Court’s comment: “The only purpose that the objectors (Appellants) could now have in urging that the City be required to retrace its steps is to further delay and impede the City in its effort to collect these taxes” (PR 382-383).

They contend that they paid in full their respective personal and real property taxes for 1949 on December 10, 1949, at the true and full value thereof, and are now rightfully and legally seeking to prevent Appellant Yakutat & Southern Railway’s real property

from being unlawfully sold for claimed taxes which were not assessed or levied according to law and which constitute over-valuations and over-assessments.

SECOND PROPOSITION.

THE TRIAL COURT WAS WITHOUT JURISDICTION BECAUSE OF APPELLEE'S NONPERFORMANCE OF THE STATUTORY AND MUNICIPAL ORDINANCE REQUIREMENTS IN RESPECT TO BOTH THE SUPPLEMENTAL DUPLICATE DELINQUENT TAX ROLL (PR 10, 13), WHICH THIS COURT HELD INVALID IN ITS OPINION OF JULY 8, 1953 (206 F2d 612), AND THE PRETENDED AMENDED SUPPLEMENTAL TAX ROLL FOR 1949 (PR 369-370), ALSO, IN RESPECT TO THE DOCUMENT (PR 347), ADDUCED IN HENRY'S DEPOSITION (PR 345-350) (Points 1, 2, 3, 4, 5, 7, 8, 12, 13, 14, 16, 19, 20, 22, 23, 24, PR 475-481).

Appellants supplement their Second Proposition herein by their Second Proposition on the first Appeal (Bf. 13,455, p. 64) and their argument herein by their argument on the first Appeal (Bf. 13,455, pp. 64-68). It and the decisions therein cited apply with equal, if not greater, force not only to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) as to the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held invalid in its Opinion of July 8, 1953 (206 F2d 612), but also to the Order of Sale (PR 388-389) of June 29, 1954, as to the Order of Sale (PR 50-51) of April 25, 1952, which this Court reversed (PR 336).

Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

This pretended Delinquent Tax Roll for 1949, upon which the trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954, upon its face shows that it was made up by Appellee's attorney William L. Paul, Jr., not by the City Clerk as prescribed by Section 17, Appellee's Municipal Tax Ordinance (PR 98). It contains no certificate under the hand of the city clerk and Appellee's corporate seal that it is a true and correct roll or list of the delinquent taxes as required by Sec. 16-1-122 ACLA 1949 (Bf. 13,455, p. 7) and by Sec. 17, *supra* (PR 98). No proof was made that its original was filed with the City Clerk or that it had been completed and was open to inspection and would be presented to the District Court or that notice to that effect had been published in any newspaper as required by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 8) and by Section 17, *supra* (PR 99). No proof was made that Attorney Paul or the City Assessor, or other municipal officer, had been designated by either Ordinance or Resolution to make it up as required by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 7). No proof was made of notice of its posting or publication for 30 days as required by Sec. 16-1-122, *ibid* (PR 8-9) or for four weeks as required by Sec. 17, Municipal Ordinance (PR 99). It couldn't have been posted or published for either 30 days or four weeks because it was made on June 23, 1954 (PR 369-370), the day before the trial Court held a hear-

ing on it on June 24, 1954 (PR 434-435). Furthermore, posting would have been invalid because no proof was made that Appellee had changed its Ordinance (PR 99) to authorize posting instead of publishing.

Appellants' Motion to Strike (PR 379-391) called the trial Court's attention to these statutory defects in the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370); and, again, in their Objections to Order of Sale (PR 384-387), and, again, in their Motion for New Trial (PR 390-394).

Appellee's counsel in open Court (PR 460) admitted the correctness of the facts in Appellants' Motion to Strike (PR 379-381), but not any legal conclusions or the validity of the objections.

It purportedly valued real property alone at \$193,695.00 and claimed delinquent taxes of \$1,988.29 on real property alone, whereas the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held invalid in its Opinion of July 8, 1953 (206 F2d 612), claimed delinquent taxes of \$1,909.38 on real and personal property together, and whereas the document (PR 347), adduced by Appellee's witness Henry's deposition (PR 345-350), under a column headed "Board", shows "11,000" on the same line as "Land" and "176,625" on the same line as "Improvements" or a total of "187,625", not "\$193,695.00". Section 20, Municipal Ordinance (PR 101), defines real property as including not only the land itself but also all buildings, structures, improvements, fixtures, possessory rights, and privileges, and tract as

the land itself, together with fixtures and improvements thereon.

That document, which witness Henry said "is a true copy of the assessment rolls" (PR 346), does not show, nor was any evidence adduced, that the assessor made the affidavit required by Sec. 4, Municipal Ordinance (PR 87), or that he took the oath required of all city officers by Sec. 16-1-54 (Bf. 13,455 p. 20). In fact, the "11,000" and "176,625", above mentioned, as well as the figure "94,000" are in the column headed "Board", not in the column headed "Assessors", plainly indicating that if any assessment was made, which Appellants deny, it was made by the Board of Trustees not by the Assessor, although Sections 2, 3, 4, and 5, Municipal Ordinance (PR 85-88), required the annual appointment of an assessor and that he make the assessment.

The Order of Sale (PR 388-389) of June 29, 1954, held that Appellants were delinquent for real property taxes of \$1,988.29.

The pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) claims a penalty of \$198.83 and claims 1% interest monthly for 54 months on \$2,187.12 (\$1,988.29 + \$198.83), amounting to \$1,181.04.

Sec. 16-1-112, ACLA 1949 (Bf. 13,455, p. 5) authorizes the imposition of a penalty of not to exceed 15% upon delinquent taxes, and of interest of not to exceed 12% per annum upon delinquent taxes and penalties. However, Sec. 12, Municipal Ordinance (PR 94)

ambiguously provides "On all delinquent taxes a penalty shall be added, which shall be a sum equal to interest at the rate of 12% per annum from the date of such delinquency". It contains no provision for interest upon either delinquent taxes or penalty. At the most it provides for a penalty; but Sec. 16-1-122, *supra*, does not authorize a penalty computed at an annual rate, but only a flat penalty of not to exceed 15% upon the taxes.

The Order of Sale (PR 388-389) allowed delinquent real property taxes of \$1,988.29, plus penalty of 12% thereon, plus interest on such delinquent taxes at the rate of 1% monthly.

An ambiguity in a tax ordinance is construed strictly against the taxing body, and resolved in favor of the taxpayer.

Gould v. Gould, 245 US 151, 153.

B. F. Goodrich v. Peck, 101 OhSt 202.

U.S. v. Merriam, 263 US 179, 187-188.

The Municipal Ordinances (PR 85-102) failing to provide for interest on delinquent taxes or on penalty, Appellants submit that the Order of Sale (PR 388-389) could not allow interest thereon.

No notice of application or application for order of sale, required by Sec. 16-1-123, ACLA 1949 (Bf. 13,455 p. 9), was served or filed other than the Application and Notices (PR 1-14) before this Honorable Court on the first appeal.

The trial Court conceded Appellee's procedure was "somewhat irregular" (PR 383); also, that he knew

“there have been a lot of irregularities” (PR 462); also, in connection with the Order of Sale (PR 50-51) of April 25, 1952, “No attorney fee was allowed because of irregularities on the part of Yakutat of the kind to encourage litigation” (PR 30).

Nevertheless, in its Memorandum Decision (PR 383), filed June 25, 1954, it held in effect that no substantial rights of Appellants had been affected.

Appellants submit that all the authorities, cited to this Honorable Court on the first Appeal (Bf. 13,455, pp. 65-78), support their contention that these irregularities and failure to comply with the provisions of Sections 16-1-122 and 123, ACLA 1949 (Bf. 13,455, pp. 7-10), and of Appellee's Ordinance (PR 98-102) have affected, even lost, their substantial rights.

The U. S. Supreme Court, in a suit wherein a tax title was in controversy, said of the following irregularities

1. No valid assessment for the year in question
 - a. Because the assessor did not take and subscribe the statutory oath or affirmation.
 - b. Such oath not endorsed upon the assessment books prior to their delivery to the assessor, as required by statute.
2. Failure to publish notice.
3. Failure of the Clerk to certify at the foot of the list of delinquent taxes, the name of the newspaper said list was published in, the date of publication, and the length of time.

4. Failure of the Clerk to attend the sale and make a record in a substantial book, etc.
5. Failure of the Clerk to take the property off the tax roll for the reason that it had been struck off by the state.
6. Failure of the Clerk to deliver to the Collector the tax book, with his warrant attached, thus authorizing the Collector to collect the taxes.
7. Failure of the collector to post notices (printed) of his attendance at certain places to receive the taxes, etc.
8. Failure of the collector to furnish a list to the Clerk of all such taxes that he had been unable to collect, for the purpose of striking from the tax list any exempt property.

“In the present case, it is contended by the appellant that the irregularities alleged by the appellee were cut off under Section 5791 (Statute of Limitations), because they commenced no suit within two years from the date of the sale. But those irregularities deprived the appellees of a substantial right, and were not technical objections to the sale, and were prejudicial to the appellees.”

Martin v. Barbour, 140 US 634, 643.

These irregularities before the U.S. Supreme Court are similar to, in fact, some of them are identical with, those committed by Appellee in respect to both

the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) and the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

As stated by the U.S. District Court, W. D. Arkansas, wherein one of the irregularities was the County Clerk's failure to attach his warrant to the tax books delivered to the Collector,

“The provisions of the law made for the protection and benefit of the taxpayer are mandatory.”

Conn v. Little, et al., 101 F Supp 683, 684.

Appellants submit that the provisions of Sections 16-1-122 and 123, ACLA 1949 (Bf. 13,455, pp. 7-10) as well as Sections 17 and 18, Municipal Ordinance (PR 98-100), are for the benefit of the taxpayer, and that their performance is jurisdictional.

The publication of the notice of sale only once instead of three times as prescribed by Ordinance, was held a fatal defect in the proceedings:

McCaslin v. Hamlin, 223 P2d 326, 327, 328, so here the failure to perform the statutory and municipal ordinance requirements not only affected Appellants' substantial rights and is a fatal defect in these proceedings; but, as said by Judge Jennings, the trial Court had no jurisdiction until its action had been invoked in accordance with Sections 16-1-122 and 123 (Bf. 13,455, pp. 7-10).

In re Delinquent Tax Roll, 4 Alaska 721, 723, 726 (Bf. 13,455, pp. 65-66).

Moreover, Section 16-1-65, ACLA 1949 (Bf. 13,455, p. 20) mandatorily requires:

“The assessor shall once each year, at such time as the council may direct, duly list and assess all the taxable property of the city at its just and fair value.”

That statute was made applicable to Appellee by Section 16-2-5, *ibid* (Bf. 13,455, pp. 2-3). Congress changed the words “just and fair” to “true and full value” on June 3, 1948.

Sec. 48-1-1, *ibid* (Bf. 13,455, pp. 21-22).

Sections 2, 3, and 4, Municipal Ordinances (PR 83-88), likewise require the assessor to make an annual listing and assessment.

Appellants submit the record contains no evidence of the assessor having listed and assessed their property at its true, and full, or any, value for the tax year 1949; in fact, the document (PR 347), adduced by Henry's deposition (PR 345-350), by placing “11,000”, “176,625”, and “94,000” in the column headed “Board”, not under “assessors”, shows that the assessment, if any, which Appellants deny, was made by the “Board” not by the “Assessor” notwithstanding the provisions of Sections 2, 3, and 4, Municipal Ordinance (PR 85-88). Therefore, the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) is not even *prima facie* evidence of the regularity and legality of the assessment and levy of the tax under Sec. 16-1-124 (Bf. 13,455, p. 11).

THIRD PROPOSITION.

THE ORDER OF SALE OF JUNE 29, 1954, AS DID THE ORDER OF SALE OF APRIL 25, 1952, DISREGARDS UNCONTRADICTED, UNIMPEACHED, COMPETENT EVIDENCE AND ITS WEIGHT AND CREDIBILITY, AND IS BASED UPON AN EX PARTE AFFIDAVIT AND OTHER INCOMPETENT EVIDENCE, AND IGNORES APPELLEE'S FAILURE TO PROVE THE LISTING AND ASSESSING FOR THE TAX YEAR COMMENCING JUNE 1, 1949, AT THEIR TRUE AND FULL VALUE EITHER THE REALTY OR THE PERSONALTY OF APPELLANTS (Points 1, 2, 3, 9, 10, 11, 12, 13, 18, 19, 22, 23, 24).

Appellants adopt their argument (Bf. 13,455, pp. 78-86) in support of their Third Proposition, which pertains to their points 1, 2, 3, 9, 10, 11, 12, 13, 18, 19, 22, 23 and 24 (PR 475-481), on the First Appeal and it and the decisions therein cited apply with equal, if not greater, force to the Order of Sale (PR 388-389) of June 29, 1954, as to the Order of Sale (PR 50-51) of April 25, 1952, which this Honorable Court reversed by its opinion of July 8, 1953 (206 F2d 612) and its Mandate (PR 335-337) of August 19, 1953.

Order of Sale of June 29, 1954 (PR 388-389).

This Order of Sale (PR 388-389) was based, according to the trial Court's Memorandum Decision (PR 382) and the Order (PR 388), upon the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), whose invalidity Appellants discussed (pp. 18-26, supra).

The only additional evidence, not before the trial Court at the hearing on January 18, 1952 (PR 28), and not before this Honorable Court on the First Appeal in Its Case No. 13,455 wherein it reversed the

Order of Sale (PR 50-51) of April 25, 1952, adduced in support of this pretended Tax Roll was Henry's evidence, testamentary and documentary, by deposition (PR 345-350).

Appellants discuss the incompetency and inadmissibility of this evidence under their Fourth Proposition (pp. 36-45, *infra*), so will not do so now.

The trial Court admitted and considered it over Appellants' Objections (PR 343-344) to its taking, which Appellee did without awaiting the trial Court's ruling on those Objections, and Appellants' Motion to Suppress it (PR 355-356), which Objections and Motion were presented to the trial Court in Anchorage (PR 364-365) and were renewed by Appellants' Renewal, thereof, dated June 23, 1954, (PR 371-379) in open Court on June 24, 1954 (Minute Order, PR 405; also, 423, 441, 442, 447).

The trial Court's minute order of June 12, 1954 (PR 365) authorized such renewal without prejudice if Appellee failed to present a new duplicate delinquent tax roll on or before June 24, 1954. Appellee failed to present any new duplicate delinquent tax roll, and did not serve the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) until mid-afternoon June 23, 1954 (PR 370; 379), whereas the new trial was held the next morning.

Appellants cited in their Renewal of those Objections and Motion numerous authorities (PR 375-378) showing the incompetency and inadmissibility of Henry's deposition (PR 345-350), which they again

cite (pp. 41-45, *infra*), and which are equally applicable to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), although Appellants did not so state (PR 374) in their Renewal (PR 371-379) because that pretended Roll was not served upon them until after their counsel had written that Renewal (PR 379).

The evidence (Bf. 13,455, pp. 36-48; 51-59; 79-83) before the trial Court on January 18, 1952, and before this Honorable Court on the First Appeal in its Case No. 13,455 no more proved the validity of the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) than it did the validity of the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13).

The trial Court's Order of Sale (PR 388-389) of June 29, 1954, was necessarily based upon Henry's deposition (PR 345-350) with its incompetent and inadmissible evidence because, as stated, no other additional evidence was before it on June 24, 1954, in support of this proceeding.

Without additional evidence, the trial Court's Order of Sale (PR 388-389) of June 29, 1954, would have been directly contrary to this Honorable Court's Opinion of July 8, 1953, (206 F2d 612) and its Mandate (PR 335-337) of August 19, 1953.

Witness Henry's deposition, with document (PR 345-350), which was incompetent and inadmissible as stated in Appellants' Fourth Proposition (*infra*), did not prove the assessor, as required by Sec-

tion 16-1-65, ACLA 1949 (Bf. 13,455, p. 20), and by Sections 2, 3, and 4, Municipal Ordinance (PR 85-88), had listed and assessed Appellants' property for the tax year 1949 at its true and full value. If it had been competent, at the most it showed that the Board, not the Assessor, had for 1949, under the column headed "Board", not under the column headed "Assessor's", inserted on the line opposite "Land" the figures "11,000", opposite "Improvements" the figures "176,625", and opposite "Personal" the figures "94,000." (PR 347). "11,000" plus "176,625" total "187,625", not \$193,695.00 as stated in the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

These differences are not small, but even if they were that would not validate them.

"The excessive levy is in fact small and trifling, . . . 'The smallness of the amount of the excess over the amount due does not, in a tax sale, affect the question, as the maxim, *De minimis non curat lex*, does not apply to tax sales. The provisions of the law made for the protection and benefit of the taxpayer are mandatory' . . .

"In *McCulloch v. Maryland*, 4 Wheat. 316, 17 US 316, 429, 4 L.ed. 579, Chief Justice Marshall stated, 'that the power to tax involves the power to destroy.' This principle is pertinent when there is no power to tax or when the amount of the tax is not authorized. The right to extend a tax levy is dependent upon the authority to extend the specific tax at the legal and authorized rate."

Conn v. Little, et al., 101 F Supp 683, 684, 685.

There was no other evidence, competent or incompetent, of any kind in support of that Pretended Tax Roll (PR 369-370) to prove that Appellants' separate property had been separately listed and assessed as to either personalty and realty, adduced at the hearing on June 24, 1954.

This Honorable Court in its Opinion of July 8, 1953, (206 F2d 612, 616) held:

“Since there is nothing in the record” (Volume I, PR herein) “to indicate, and no basis for a presumption that realty was properly assessed, or, if properly assessed, that any specific amount of taxes thereon is unpaid, the City has made no case against appellants. No part of the order can stand.”

Appellee is now seeking to supply (PR 440-441) that deficiency through the incompetent and inadmissible evidence of Henry's deposition (PR 345-350), particularly by the document (PR 347). In its petition for rehearing (p. 8) in this Court's case No. 13,455 Appellee asserted that “the record is replete with evidence from which the Court could make findings;” and referred this Court to pages 117-126, 131, 134, 137, 147-149, 152-155, 162, of what is now Volume I, PR. This Court denied that petition for rehearing. Information of the same kind in almost the same form but for 1948, whose claimed taxes the trial Court disallowed, appears at PR 148 and, in narrative form, at PR 125 for 1949, which Appellee then claimed as it now claims the incompetent, inadmissible document (PR 347) supplies the deficiency in the record (PR

440-441), which document is *not new evidence* as it shows on its face that it was in existence and in Appellee's possession at the time of the first trial on January 18, 1952, it purportedly originating in 1948. If it ever were competent and admissible, which Appellants contend it was not, Appellee should have adduced it at the first trial. Appellee obtained a new trial and the Order of Sale (PR 388-389) of June 29, 1952, not upon new evidence, but upon evidence which it withheld from adducing at the first trial. It was not newly discovered evidence, as required by Rule 59, FR Civ. P., nor does it come within Rule 60, *ibid*, assuming but not conceding a new trial could be granted.

The trial Court's statement in his Memorandum Decision that, "evidence in support of the objection that the properties have been overvalued is not admissible here because it was not presented to the Board of Equalization" (PR 383), entirely ignores the lack of any listing and assessing by the assessor of Appellants' properties for the tax year 1949 as required by Section 3, Municipal Ordinance (PR 86), and by Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 7); hence, that the entire proceeding is void from the beginning and that Appellants had no obligation to comply, assuming without conceding its validity, with Sec. 7, Municipal Ordinance (PR 89-90).

Appellants in the sixth defense in Cause No. 6302-A (PR 112) specifically charged that the 1949 assessment was not made by the assessor, also therein and in the fourth defense (PR 111) that the taxes were

not levied in accordance with Sections 1, 2, and 3, Municipal Ordinance (PR 85-86).

Appellants in their Objection No. 12 (PR 21) of September 25, 1951, specifically charged that the assessment was made by one Toner who was not the city assessor, which was served upon Appellee on October 9, 1951 (PR 22).

Appellants in their trial Brief of February 11, 1952, requested time to adduce evidence to prove that no assessment was made for 1949 and that the purported assessment was illegal (PR 33).

Appellants in their Proposed Findings and Conclusions of March 22, 1952, after the hearing of January 18, 1952, requested Findings 2, 3, 4, and 5 (PR 42-43), to the effect no person took the oath or qualified as assessor, no assessment was made by Appellee, Toner was never appointed or qualified as assessor, the Board of Trustees made no assessment, for the tax year 1949, also Requested Finding 14 (PR 44) that the Municipal Ordinance (PR 85-86) required the assessment to be made by an assessor.

Toner testified that he took no oath as assessor and that he didn't think he was appointed assessor (PR 190), also that he appraised the property in January or February, 1950 (PR 190), which was six weeks or more subsequent to Appellants' counsel paying their taxes of \$1751.75 for 1949 (PR 143-145) and to the entry of "Dec. 12, 1949, \$1751.75" on the Document (PR 347) under the Columns headed "Date Payment" on the line opposite "Land".

All those matters, except the Document (PR 347), were before the trial Court entered its Order of Sale (PR 80) of April 25, 1952, and all, except the Document (PR 347) and Appellants' Requested Findings and Conclusions (PR 42-49), were before the trial Court before it filed its Opinion (PR 38-41) of March 6, 1952.

All of those matters, except the document (PR 347), were before this Honorable Court before it rendered its Opinion of July 8, 1953, 206 F2d 612. (Bf. 13,455, pp. 29-36, also 42-44).

The record contains no evidence of the appointment of an assessor, his taking an oath of office, or his listing or assessing Appellants' properties for 1949; in fact, on Appellee's document (PR 347), in the section headed "1949", under the Column headed "Board", not "Assessors", "11,000" appears on the line opposite "Land", "176,625" on the line opposite "Improvements", and "94,000" on the line opposite "Personal."

The trial Court's Memorandum decision (PR 382-383) thus holds, though Appellee failed to perform the jurisdictional requirements of Sec. 3, Municipal Ordinance (PR 86-87) and of Sec. 16-1-112, ACLA 1949 (Bf. 13,455, pp. 4-5), to make an annual listing and assessment, that, if Appellants failed to strictly comply with Sec. 7, Municipal Ordinance (PR 89-90), they are without right to challenge the invalidity of the pretended assessment.

Appellants submit that this puts the cart before the horse, and that they need pay no attention to an

assessment which is not made in accordance with statutory and municipal requirements.

They contend that Sec. 7, Municipal Ordinance (PR 89-90) is not authorized by Sec. 16-1-112, ACLA 1949 (Bf. 13,455, pp. 4-5), nor that non-compliance therewith limits the trial Court's jurisdiction under Sec. 16-1-124, ACLA 1949 (Bf. 13,455, pp. 10-12), to hear and determine, according to equitable principles, whether any tract was over-valued or over-assessed or whether the Board of Trustees had acted in bad faith.

Appellee is a public corporation, a political subdivision of the Territory. It has only such legislative powers as the Territory delegates to it. It is not an administrative body.

Appellee's claimed new legal issue that Appellants "did not exhaust their administrative remedy" (PR 449), which it waived by not presenting at the January 12, 1952, hearing, does not apply to a legislative body.

Appellants submit that, if the rule re exhaustion of administrative remedies applied, which they don't concede, the trial Court abused its discretion in holding upon the same facts between the same parties that Appellants have no right to challenge the validity of the claimed taxes because of that rule when Appellee failed to make the assessment in the manner provided by statute and ordinance.

The application of that rule is a matter of judicial discretion.

“Whether it should have denied relief until all possible administrative remedies was a matter which called for the exercise of its judicial discretion.”

U.S. v. Abilene, etc., Co., 265 US 274, 282.

FOURTH PROPOSITION.

APPELLEE'S WITNESS HENRY'S TESTIMONY, WITH ITS DOCUMENTARY EVIDENCE (PR 345-350), WAS INCOMPETENT AND INADMISSIBLE TO EXTRINSICALLY EITHER IMPEACH OR SHOW FACTS NOT DISCLOSED BY EITHER THE SUPPLEMENTAL DUPLICATE DELINQUENT TAX ROLL (PR 10, 13) WHICH THIS HONORABLE COURT HELD WAS INVALID IN ITS OPINION OF JULY 8, 1953 (206 F2d 612), OR THE PRETENDED AMENDED SUPPLEMENTAL DELINQUENT TAX ROLL FOR 1949 (PR 369-370) (Points 23, 24, PR 481).

The trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954, upon the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

Appellants submit that Henry's testimony, with its documentary evidence (PR 345-350), was incompetent and inadmissible to support either Appellee's pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) or the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) which this Honorable Court held was defective in its Opinion of July 8, 1953 (206 F2d 612), in its Case No. 13,455. In open Court on June 24, 1954, Appellee took the position that it cured the latter (PR 440-441).

As previously stated this was the only additional Evidence at the trial on June 24, 1954, adduced in support of this proceeding (p. 8, supra).

Appellants directed the trial Court's attention to its incompetency and admissibility nine times: (1) Objections (PR 343-344) to its taking; (2) Motion to Suppress it (PR 355-356); oral argument in Anchorage on June 11, 1954 (PR 364; 423); (3) Objections to Appellee's Motion to Strike (PR 357-359, at 357); (4) Renewal of Motions and Objections (PR 371-379) citing decisions upon this very point (PR 374-379); (5) Motion to Strike (PR 379-381, at 381) pretended Amended Supplemental Tax Roll for 1949 (PR 369-370); (6) In open Court on June 24, 1954 (PR 435, 436, 441, 442, 447; (7) Objections to Order of Sale (PR 384, 385, 386); (8) In open Court on June 29, 1954 (PR 453); and (9) Motion for New Trial (PR 390-394; at 391, 392).

Appellee risked taking Henry's deposition on May 24, 1954 (PR 345-350), without awaiting the trial Court's ruling on Appellants' Objections (PR 355-356) to its taking.

The document (PR 347) is not new or newly discovered evidence. It purports to show on its face that its making was commenced in 1948. It is a purported City document (PR 346). It must have been in Appellee's possession at the first trial on January 18, 1952, but Appellee withheld it from the Court's knowledge and did not offer it in support of the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13),

because Appellee's counsel swore in Appellee's Response (PR 367-368) to Appellants' Demand for Production of Documents (PR 365-366): "This is a partial new trial and no evidence than is already in the official in either cause is to be adduced than what the *parties* could have had many months ago" (PR 368) (emphasis supplied), notwithstanding Appellants' Motion of February 11, 1952 (PR 32-33), that all of the municipal records be brought into at Appellants' expense and examined by the trial Court before it finally considered this proceeding.

The duplicate delinquent tax roll which is presented to the Court is the primary record. After the hearing, the original is to be corrected from the duplicate, not the duplicate from the original. (Sec. 16-1-126, ACLA 1949; Bf. 14,355, p. 12). No evidence was offered of the existence of an original or the filing thereof with the City Clerk of the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) as required by Section 16-1-122, *ibid*, Bf. 14,355, p. 8) and by Section 17, Municipal Ordinance (PR 99).

No Statutory Authority Exists to Amend, Enlarge, or Impeach by Extrinsic, Aliunde, or Other Evidence a Duplicate Delinquent Tax Roll Presented to the Court, or to Present a New Duplicate Delinquent Tax Roll.

The common definition of an assessment or tax roll or list is:

"While it seems that a paper or warrant containing a tax against a single place only may be

regarded as a 'tax list' within the meaning of certain statutes, an assessment or tax roll or list appears ordinarily to be a completed record for the year of all the taxable persons and property within the tax district, so arranged and itemized as to show to each taxpayer who may examine it exactly what property he is assessed on and the amount of tax he is required to pay thereon, although it may perform other functions."

84 CJS 888, Sec. 454.

"An assessment list or roll can be made with proper legal effect only by the particular board or officer designated by statute."

Ibid, p. 888, Sec. 455.

Appellants submit no distinction exists between adding omitted property to a delinquent tax roll than to offer evidence to show that real and personal property taxes, instead of being lumped, were assessed separately and segregated.

An assessor may not add omitted property to the assessment roll unless authorized by statute.

Ibid, p. 957, Sec. 508.

The duplicate delinquent tax roll (PR 10, 13) shows that both real and personal property were assessed, but that they were not segregated or separately assessed; hence, this Honorable Court set aside the trial Court's Order of Sale of April 25, 1952. Appellee claimed (PR 440-441) that deficiency in the record was supplied by Henry's deposition (PR 345-350), and that no amended delinquent tax roll was neces-

sary (PR 440) but nevertheless presented and the trial Court based its Memorandum Decision (PR 382-383), filed June 25, 1954, and its Order of Sale (PR 388-389) of June 29, 1954, upon the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), notwithstanding Henry's documentary evidence (PR 347) did not support that pretended Tax Roll which shows real property alone valued and assessed at \$193,695.00 and delinquent taxes of \$1,988.29, but shows, as stated, under the column head "Board", not under the column headed "Assessor's", on the line opposite "Land" the figures "11,000", and on the line opposite "Improvements" the figures "176,625.00" which total "187,625" not \$193,695.00, regardless of the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13) showing combined delinquent realty and personalty taxes of \$1909.38. The Order of Sale (PR 388-389) of June 29, 1954, took the figure \$1,988.29 from the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) so must have ignored the claimed figures of "187,625.00" in the document (PR 347).

No other evidence was adduced in support of the pretended Tax Roll (PR 369-370).

Regardless of whether Appellee claims Henry's deposition, testamentary and documentary (PR 345-350), supports the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), or the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), it is not competent or admissible evidence.

The rule is in order to sustain an addition of property by tax assessors as omitted, it must appear that the items added were not assessed in the original assessment.

Ibid, p. 959, Sec. 508.

Even where reviewing boards or officers are authorized by statute to make corrections in the assessment roll, they must do so strictly in accordance with the statutory provisions.

Ibid, p. 998, Sec. 520.

Here there is no statutory authority for any one to make any corrections in the duplicate delinquent tax roll.

This same principle is also laid down in

Ibid, p. 1002, Sec. 521.

and in

Ibid, p. 1006, Sec. 522.

Section 16-1-122, ACLA 1949, specifically provides what shall be contained in the delinquent tax roll, viz.:

“Such roll shall show therein the property assessed, the amount of the tax due, penalty and interest, separately stated on each tract assessed, to whom each tract is assessed, if assessed as unknown, so stated.”

The facts stated in the roll are conclusive. Dorothy Henry's deposition seeks to establish other facts and to impeach the roll.

The Duplicate Delinquent Tax Roll itself is the best evidence.

Ronkendorff v. Taylor, 7 L Ed 882;

84 CJS 758, Taxation, Sec. 395;

Brink v. Dann, 144 NW 734, 736.

The only changes in it that the statute authorizes are payments made during time of publishing or posting and up to time of sale, Sec. 16-1-122, ACLA 1949 (Bf. 13,455, p. 8), which must be endorsed upon both the original and the duplicate, and proportionate share of costs by the Clerk of the District Court on the duplicate. Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12).

“Extrinsic evidence is not admissible to establish facts which can be evidenced only by the assessment roll.”

84 CJS, p. 922, Sec. 485.

No statutory authority exists to correct any error in the roll by showing what the Appellee now claims is the correct amount of taxes that should have been assessed against the real property only.

Ibid, Sec. 520, p. 998, *supra*.

“The necessity, sufficiency, correction, and preparation of duplicate lists or rolls depend”
“on statutory provisions.”

Ibid, Sec. 842, p. 920.

“Tax records and documents are commonly considered conclusive and not subject to impeachment by parol evidence.”

32 CJS, p. 806, Sec. 883.

Affidavit of Service of notice to redeem from tax sale cannot be aided by parol.

Geil v. Babb, 242 NW (Iowa) 34.

Assessment roll. Insufficient description of land on assessment roll cannot be aided by extrinsic evidence, and name listed under heading of "owner" cannot aid description.

Ransom v. Young, 168 So. (Miss.) 473.

Plat book of an assessor cannot be impeached or varied by parol evidence as to the description of land.

Blayden v. Morris, 214 P. (Idaho) 1039.

Record of board of assessors, which is duly kept pursuant to statutory requirement, generally cannot be varied or added to by other evidence.

Carbone, Inc., v. Kelly, 194 N.E. (Mass.) 701.

Records of county commissioners as to whether a tract of land is seated or unseated and has been assessed, taxed, and sold by the treasurer cannot be varied by parol testimony or by the private record of an assessor.

McCall v. Lorimer, Pa. 4 Watts 351.

See also:

Trustees of St. Paul Methodist Episcopal Church South v. District of Columbia,
212 F. 2d 244;

Tumulty v. District of Columbia, 1949
69 App. D.C. 390, 400, 102 F. 2d 254, 264;

Atchison, T. & S. F. Ry. Co. v. Elephant Butte Irr. Dist., 10 Cir. 1940, 110 F. 2d 767, 773;
 Cooley, Taxation, Vol. 3 (4th Ed. 1924), 1046.

No evidence was adduced that the assessor, if there was one, which Appellants deny, ever made and subscribed an affidavit to the document (PR 347), if it is construed to be the assessment book, as required by Section 4, Municipal Ordinance (PR 87), or that he annually and for the tax year 1949 listed and assessed the property at its true and full value, as required by Sec. 3, *ibid* (PR 86), and by Sec. 16-1-65, ACLA 1949 (Bf. 13,455, p. 20), or that he took an oath of office as required by Sec. 16-1-54, *ibid* (Bf. 13,455, p. 20), or that he made or prepared the document (PR 347), which upon its face purports to show that the figures thereon are those of the Board, not of the Assessor, because no figures are under the column headed "Assessor's". They are under the column headed "Board", notwithstanding Sec. 3, Municipal Ordinance (PR 86), required the assessor to make the assessments. Therefore, the document (PR 347) is not *prima facie* evidence of any listing, assessment, valuation or levy because on its face, with no proof to the contrary, it shows compliance with neither statute nor ordinance. Similarly, the pretended Amended Supplemental Delinquent Tax Roll is not *prima facie* evidence of any assessment or levy for 1949 (PR 369-370). See, *supra*, p. 36.

People v. San Francisco Savings Union,
 31 Cal. 132, 138;

National Distillers, etc. v. Board, etc.,
 256 SW 2d 481, 484;
 84 CJS 752, Taxation, Section 392.

The facts (PR 379-381), stated in Appellants' Motion to Strike that Pretended Roll, are admittedly correct. Appellee's admission (PR 460). Appellants' Motion to Amend or Alter Minute Order (PR 390) and Motion to Strike (PR 379-381).

"Presumptions and burden of proof. As in other civil cases, the burden is on the plaintiff to establish a prima facie case and on the defendant to overcome it, and to establish his affirmative defenses. In a suit to enforce a tax lien, the burden is on plaintiff to show that the tax was legally assessed, legally committed to an officer for collection, and that the defendant was the owner or in possession of the land . . ."

Taxation, 85 CJS 83, Section 780.

FIFTH PROPOSITION.

THE TRIAL COURT WAS WITHOUT JURISDICTION TO TRY THIS PROCEEDING DE NOVO, AND THIS HONORABLE COURT'S MANDATE (PR 335-337) OF AUGUST 19, 1953, ISSUED IN CASE NO. 13,455, AND THE TRIAL COURT'S JUDGMENT ON MANDATE (PR 339) ARE RES JUDICATA, AND THIS HONORABLE COURT'S OPINION OF JULY 8, 1953, IS THE LAW OF THE CASE (Points 16, 17).

Appellants brought this point to the trial Court's attention ten times prior to the new trial on June 24, 1954, viz.: in open Court on May 10, 1954 (PR 413-414); in open Court on May 11, 1954 (PR 415-421);

on May 21, 1954, by Objections (PR 343-345) to Appellee's taking witness Henry's deposition; on May 28, 1954, by Motion (PR 355-356) to suppress that deposition, and by Objections (PR 357-358) to Appellee's Motion to strike portions of the printed appeal record in this Honorable Court's Case No. 13,455 (PR 341-342), and by Motion (PR 351-353) to vacate the trial Court's order, entitled "Order Shortening Time" (Sup. PR 350a), setting this proceeding for new trial on June 24, 1954; in open Court to Judge Folta in Anchorage on June 12, 1954 (PR 424-434); on June 23, 1954, by Renewal of all of said Motions and Objections (PR 371-379); on June 24, 1954, by Motion to Strike (PR 380-381) to strike the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370); and in open Court on June 24, 1954 (PR 435); and three times after the hearing on June 24, 1954, viz.: on June 29, 1954, by Objections (PR 384-387) to the proposed Order of Sale (PR 388-389); on July 2, 1954, by Motion for new trial (PR 390-394; and in open Court on July 28, 1954 (PR 390).

This Honorable Court had before it in Case No. 13,455 all of Volume I, Transcript of Record herein, including the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which it held invalid and which was the only Duplicate Delinquent Tax Roll before the trial Court when it set this proceeding for trial in its Order, entitled "Order Shortening Time" (Sup. PR 350a).

This Court in its Opinion (206 F2d 612) characterized this proceeding as a special proceeding; in fact, it is so characterized by the statute itself. Sec. 16-1-122; ACLA 1949 (Bf. 13,455, p. 7). In that Opinion this Court said:

“If the amount were separately stated in the delinquent tax roll filed by the city with its application for order of sale, it would be presumed that the realty was properly assessed and that the amount stated remains unpaid.”

206 F2d 612, 616.

The amount has never been stated in any delinquent tax roll other than the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370), which admittedly was not prepared or presented in accordance with statutory or municipal ordinance requirements (PR 439-440; also 379-381 and 460).

See: Second Proposition, pp. 18-26 *supra*.

Appellants submit that the principles announced by the United States Supreme Court and this Honorable Court and other Courts in many decisions clearly sustain their contention as to the finality of the “Order of Sale” (PR 50) in denying Appellee’s Application for sale to make the 1948 taxes and the finality of this Honorable Court’s Mandate, issued on August 13, 1953 (PR 335-337), in denying that Application for sale to make 1949 taxes under Chapters 16-1-121 through 131, ACLA 1949, and that the trial Court had no jurisdiction, after the entry of that Order and of that Mandate, to further try that appli-

cation upon that delinquent tax roll (PR 10, 13) or upon the pretended Amended Supplemental Tax Roll for 1949 (PR 369-370) or to admit and consider any evidence, *aliunde* or otherwise, in support or proof of either of those duplicate delinquent tax rolls.

This Honorable Court's Mandate of August 19, 1953 (PR 335-337), did not send this proceeding back for a further or new trial, but it did contain the command:

“You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.”

The United States Supreme Court, in construing a mandate containing a similar command in a case in which the Railroad Company contended that no judgment had been entered against it, but only against its former receiver, said:

“Every point the receiver could have presented was raised on behalf of the company, and disposed of after elaborate argument and careful consideration and the stipulation in that regard was fully complied with. If it had been intended to reserve the present contention, it is enough to say that that intention was not expressed and cannot be inferred, and the matter was determined by our judgment. The Circuit Court properly attempted to exercise no discretion in the premises, but discharged its duty by carrying the mandate into effect according to its terms. This court awarded execution against the company for the

costs here, but it was for the Circuit Court to award execution for the amount of the judgment, as it was directed to do, and as it did, and interest was properly included at the rate which obtained under the law of Texas at the time judgment was rendered, the change in the law in that respect operating only prospectively. Inasmuch as its action conformed to the mandate, and there were no proceedings subsequent thereto not settled by the terms of the mandate itself, the case falls within the rule often heretofore laid down and a second writ of error cannot be maintained. *Cook v. Burnley*, 11 Wall. 672, 677; *Steward v. Salamon*, 97 U.S. 361; *Humphrey v. Baker*, 103 U.S. 736."

Texas & Pacific Ry. v. Anderson, 149 US 239, 241, 242.

The United States Supreme Court in a case where the appeal opinion said:

"The decree will be reversed and the case remanded for further proceedings not inconsistent with this opinion,"

while allowing a replication to be filed in an equity case after the appeal, the case originally having been decided upon the complaint and answer only, said:

"It must be remembered, however, that no question, once considered and decided by this court, can be reëxamined at any subsequent stage of the same case. *Clark v. Keith*, 106 U.S. 464; *Sibbald v. United States*, and *Texas & Pacific Railway v. Anderson*, cited at the beginning of this opinion."

In re Sanford Fork & Tool Company, 160 US 247, 255, 259.

Another United States Supreme Court case, construing similar language of the mandate, is:

Gulf Refining Co., et al. v. U. S., 269 US 125, 135.

The United States Court of Appeals for the Second Circuit in a criminal case where conviction for a six year term was set aside and a three year sentence imposed by the lower Court upon a showing by a defendant after the return of the mandate which contained the command:

“That such further proceedings be had in said cause, in accordance with the decision of this court, as according to right and justice and the laws of the United States, ought to be had, the said writ notwithstanding,”

said:

“In the case of *Re Sanford Fork & Tool Co.*, 160 U.S. 247, 255, 40 L.ed. 414, 416, 16 Sup.Ct. Rep. 291, 293, the Supreme Court said: ‘The circuit court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. That court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded.’

“The above statement of the law is alike applicable to civil and criminal cases, and the fact that the term has been extended is quite immaterial. The judgment which was before this court was

in law disposed of and finally settled by our decision, and is the law of the case beyond the power of the court below, which must carry it into execution according to the mandate. *Sibbald v. United States*, 12 Pet. 488, 492, 9 L.ed. 1167, 1169, and this principle of law cannot be set aside by the trial court, and its power enlarged, by merely extending the term for a period of years.

“There is a phase of this matter to which reference may be made before bringing this opinion to a conclusion. This court sits to review *final* orders, decrees, and judgments. ‘Final judgment,’ according to Bouvier, ‘is one which puts an end to a suit.’ It is used in contradistinction to a judgment which is only intermediate, and does not finally determine or complete the suit, which is known as an interlocutory judgment. In Bishop’s *New Criminal Procedure*, vol. 2, Sec. 1364, that writer, treating of writs of error, lays down the proposition that ‘this writ lies only to correct the final judgments of courts of record in their doings, after the course of the common law;’ and it is added that if a proceeding has not progressed to final judgment, or if the court is not one of record, the corresponding remedy is certiorari. And again, in Sec. 1366, the same writer says: ‘Only a final judgment, disposing of the whole cause, including all the counts, can be reviewed on a writ of error.’ ”

* * *

“When the lower court proceeds contrary to the mandate of this court, it interferes with this court’s jurisdiction as we held in *Muir v. Chatfield*, 255 Fed. 24, 27.” *ibid*, p. 536.

“And there is no doubt as to the power of this court to issue a writ of mandamus to compel the court below to enforce the judgment according to the mandate.”

U. S. v. Howe District Judge, 280 Fed 815, 820, 821;

citing

McClelland v. Garland, 217 US 268, 54 L Ed 762, 766;

Re: Wash. & C. R. Co., 140 US 91, 94, 95, 35 L Ed 673;

U. S. ex rel Mudsill Min. Co. v. Swan, 65 Fed 648; cer. den. 259 US 587, 66 L Ed 1077.

This Honorable Court's opinion of July 8, 1953, 206 F2d 612, contained no charge that the trial Court should reëxamine this proceeding, nor did it anywhere reserve or use any language indicating the intention that further evidence should or could be adduced either in support of or against the duplicate delinquent tax roll and application for sale that were its subject, nor was anything left unsettled by the terms of the mandate itself.

As said by the United States Supreme Court in

Supervisors v. Kennicott, 94 US 498, 499, 24 L Ed 260,

in which the Mandate directed a new trial,

“ . . . it is proper to inquire what must have been intended by the use of that term in the decree, since it cannot have its ordinary meaning. For that purpose, we held in *West v. Brashear*,

14 Pet. 51, that resort might be had to the opinion delivered at the time of the decree. Availing ourselves of this rule, it is easy to see that there could have been no intention to open the case for further hearing upon the issues presented and decided here. There is not an expression of any kind in the opinion indicating any such determination. On the contrary, it is distinctly declared that the mortgage was valid, and that the complainants were entitled to their judgment.”

This Honorable Court’s opinion distinctly reversed the order of sale of April 25, 1952, and said that “the amount of taxes, penalty, and interest due upon realty alone is not shown in the record”, and was not separately stated in the delinquent tax roll.

Neither in its opinion nor in its mandate did this Honorable Court direct a new or further trial; in fact, its mandate taxed costs of \$719.94 against Appellee.

This Honorable Court has repeatedly held that it has jurisdiction to issue writs of mandamus in aid of its appellate jurisdiction.

Shell Oil Co. v. U. S. Dist. Ct., 70 F2d 394 (9CCA);

Whittle v. Roche, 88 F2d 366, 371 (9CCA).

The United States Supreme Court granted mandamus against the lower court’s granting or entertaining a petition for a rehearing upon newly discovered evidence.

In re Potts, 166 US 263, 41 L Ed 994.

Neither by its opinion nor by its mandate did this Court command the trial Court to admit or consider any new or additional evidence.

Nor does this Court now have jurisdiction to recall its mandate (PR 335-337) or make any changes therein, inasmuch as the term at which it was entered has expired.

Waskey et al. v. Hammer et al., 179 F 273 (9 CCA);

Miocene Ditch Co. v. Champion M. T. Co., 197 F 497 (9CCA).

Appellee admitted those statutory requirements had not been performed in regard to the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370). The trial Court asked:

“Well, your position now is that these steps, that are set forth in the statute that must be taken with reference to the preparation and the presentation of the delinquent tax roll, need not be taken in the case of an amended tax roll? That is the thing I am in doubt about.”

Mr. Paul:

“Yes, I think so, your Honor” (PR 439-440).

Appellee also admitted (PR 460) the correctness of the facts stated in Appellants' Motion (PR 379-381) to strike that pretended Tax Roll. Appellants respectfully call attention to that Motion, including all of the first paragraph thereof and the specifically numbered Objections 1, 2, 3, 4, 5, 6, and 7, therein showing noncompliance with statutory and ordinance

requirements. In Objection 5, Appellants inadvertently said "Clerk of the Court" instead of "Clerk of the City".

Appellee then took the position that the hearing on June 24, 1954, was "a partial new trial" (PR 434; 445) and that it was upon the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Honorable Court held invalid in its Opinion of July 8, 1953 (206, F2d 612) because its counsel said, referring to this Honorable Court, "It saw the same delinquent tax roll that we are now considering", and the only delinquent tax roll this Honorable Court ever saw, prior to this instant appeal, was the one (PR 10, 13) before it in Case No. 13,455.

Appellee's counsel further said: "I look upon the tender of the amended, supplemental delinquent tax roll that I filed yesterday as being merely an amended complaint for the assistance of the Court in drawing up an order. That is all." (PR 439) and, referring to this Honorable Court, "They didn't even feel that an amended delinquent tax roll was necessary at all", and "Strictly speaking, I don't think that an amended delinquent tax roll is necessary. I only tendered it with the view of assisting the Court in making its computation" (PR 440).

Appellee also said: "At this time we are offering to introduce only evidence of segregation" (PR 435) and "We are supplying what the Court of Appeals couldn't find when it looked over the whole book" (PR 438) and "I am offering now, the evidence of

the City Clerk, consisting of the assessment roll which does show segregation” (PR 439), and “Well, I mean we have supplied the deficiency by taking the deposition of Dorothy Henry” (PR. 440-441).

Appellee did not refute Appellants’ counsel’s statement made in open Court on June 24, 1954, that its counsel had told him: “He intended to stand at this hearing upon the deposition of Dorothy Henry, that they didn’t have any delinquent tax roll” (PR 436).

Notwithstanding that the only additional evidence offered in support of granting an order to sell Appellant Yakutat & Southern Railway’s realty was the Henry deposition (PR 345-350), which does not, as noted, give the same figures as the pretended Amended Supplemental Delinquent Tax Roll (PR 369-370), and the admitted nonperformance of statutory and municipal ordinance requirements in regard to both that pretended Tax Roll and the document (PR 347) produced by the Henry deposition, the trial Court based its Memorandum Decision (PR 382-383) and its Order of Sale (PR 388-389) upon that Pretended Tax Roll (PR 369-370).

In its Memorandum Decision (PR 383) the trial Court considered Appellee’s claim: “What I am in reality doing is raising a new legal issue. That is what I am doing. The new legal issue is that the objectors did not exhaust their administrative remedy, and, therefore, they have no standing before this Court at all” (PR 449), which if either proper or valid existed at the January 18, 1952, hearing, but which Appellee then did not assert and thereby

waived, and considered the Henry deposition with its document (PR 345-350), which was not newly discovered or new evidence but was in Appellee's possession but not divulged by it at the January 18, 1952, hearing, and was incompetent and inadmissible. (Fourth proposition, *supra*).

Here the parties are the same; the properties are the same; the tax year is the same; the taxes are the same, except Appellee now claims \$1988.29 for realty taxes alone (PR 369) whereas previously it claimed \$1909.38 for combined realty and personalty taxes (PR 10, 13); the proceeding is the same as in the first Appeal before this Honorable Court in its case No. 13,455. The only further evidence, which is not new or newly discovered, is Henry's deposition with document (PR 345-350).

In *Harvey Coal Corporation v. U. S.*, Ct. Cl. 35 F Supp. 756, wherein are cited *County of Sac*, 94 US 351, and *Tait v. Western Maryland Ry. Co.*, 289 US 620, the Court said, at p. 762:

“The two proceedings, involving taxes for different years, are not the same, but the parties are the same and the question presented in this suit was before the Board, it was necessary for its decision; and it was decided by the Board. In such case, it is well settled that the Board's decision is *res judicata* in this proceeding.”

See, also:

New Jersey v. Martin, 115 F2d 968, 973;

W. H. Atkinson Co. v. Brown, 300 NW (Mich)
102, 103.

The judgment

“is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, *but as to any other admissible matter which might* have been offered for that purpose. Thus, for example, a judgment rendered upon a promissory note is conclusive as to the validity of the instrument and the amount due upon it, although it be subsequently alleged that perfect defenses actually existed, of which no proof was offered, such as forgery, want of consideration, or payment. If such defenses were not present in the action, and established by competent evidence, the subsequent allegation of their existence is of no legal consequence. The judgment is as conclusive, so far as future proceedings at law are concerned, as though the defenses never existed. The language, therefore, which is often used, that a judgment estops not only to every ground of recovery or defense actually presented in the action, but also as to every ground which might have been presented, is strictly accurate, when applied to the demand or claim in controversy. Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law, upon any ground whatever.” (Emphasis supplied.)

Cromwell v. County of Sac, 94 US 351, 24 L Ed 195, 197;

New Orleans v. Citizens Bank, 167 US 371, 396, 398.

SIXTH PROPOSITION.

THE ORDER OF SALE (PR 388-389) OF JUNE 29, 1954, ERRONEOUSLY ALLOWED INTEREST ON CLAIMED DELINQUENT TAXES ALTHOUGH APPELLEE'S TAX ORDINANCES FIXED NO RATE OF INTEREST PAYABLE THEREON; ERRONEOUSLY ALLOWED APPELLEE AN ATTORNEY FEE CONTRARY TO LAW AND DESPITE THE TRIAL COURT AGAIN FOUND APPELLEE HAD COMMITTED "A LOT OF IRREGULARITIES" (PR 462); ERRONEOUSLY CREDITED UPON APPELLEE'S CLAIMED TAXES AT ITS CLAIMED VALUATIONS AND COSTS THE \$719.94 ALLOWED AS COSTS TO APPELLANTS IN THIS HONORABLE COURT'S MANDATE OF AUGUST 19, 1953 (PR 335-337); AND ERRONEOUSLY APPLIED, CONTRARY TO APPELLANTS' INSTRUCTIONS WHEN PAYING THEM, APPELLANTS' PAYMENTS OF \$1751.75 ON DECEMBER 10, 1949, IN SUCH MANNER AS SATISFIED APPELLEE'S CLAIMED TAXES AT ITS CLAIMED VALUES OF PERSONAL PROPERTY AND TO LEAVE UNSATISFIED APPELLEE'S CLAIMED TAXES AT ITS CLAIMED VALUES OF REAL PROPERTY, WHICH PAYMENTS WERE RECEIVED, RETAINED AND NOT RETURNED BY APPELLEE (Points 21, 25, 15, 26).

1. The Order of Sale (PR 388-389) held Appellants are "delinquent for a balance due of real property taxes in the sum of \$1,988.29 since December 15, 1949, plus penalty of 12% thereon, plus interest on such delinquent tax at the rate of 1% monthly."

This \$1,988.29 was taken from the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369), neither from the document (PR 347), produced with Henry's deposition (PR 345-350), wherein no tax figure is shown other than \$3,755.00 under the column headed "Tax" on the line opposite "Total", nor from the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), wherein the combined realty and personalty taxes are shown at \$1909.38,

which Tax Roll (PR 10, 13) this Honorable Court held invalid in its Opinion of July 8, 1953 (206 F2d 612).

Sec. 16-1-112, ACLA 1949 (Bf. 13,455, pp. 4-5), authorizes Appellee's Board of Trustees "to impose, fix and provide for the collection of penalties for non-payment of taxes when due, not to exceed 15% of such tax, and to fix the rate of interest on delinquent taxes and penalties, not to exceed 12% per annum."

That section as well as Sections 16-1-111 through 131, Secs. 16-1-35, 16-1-54, 16-1-63, 16-1-65, 16-4-1, and 48-1-1, ACLA 1949 (Bf. 13,455, pp. 4-22), were extended to Appellee, which is a second class Alaskan municipality, by the 6th Paragraph, Sec. 16-2-5, ACLA 1949 (Bf. 13,455, pp. 2-3).

Sec. 12, Municipal Ordinance (PR 94), provides: "On all delinquent taxes a penalty shall be added, which shall be at a sum equal to interest at the rate of 12% per annum from the date of such delinquency."

Appellee's Municipal Tax Ordinances (PR 85-105), nowhere else impose or fix either interest or penalty upon delinquent taxes.

The quoted Section is ambiguous, hence should be construed most favorably to Appellants.

"In taxing statutes, doubts are resolved against the government."

51 *Am Jur*, p. 616, Sec. 650;

Gould v. Gould, 245 US 151, 153;

U. S. v. Merriam, 263 US 179, 187-188.

At most under the quoted section, only 12% per annum from the date of delinquency can be allowed upon legally listed and assessed taxes if any are delinquent which there are not.

2. The Order of Sale (PR 389) allowed "Costs of this hearing, including an attorney's fee to applicant of \$748.06 as for contested lien cases according to local rule No. 45."

This Honorable Court held this proceeding to be a special proceeding. 206 F2d 612.

Sec. 16-1-125, ACLA 1949 (Bf. 13,455, p. 12), provides for the allowance of "*the costs of publication of notice and hearing before the Court.*"

It makes no mention of an attorney's fee; hence, no attorney fee is allowable to become a lien upon Appellant Yakutat & Southern Railway's realty. Costs of hearing undoubtedly mean witness fees and expenses of depositions, not attorney's fee for preparing application, notices, proofs thereof, and in this instance the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370).

The right to recover costs, including attorney fees, is statutory.

Mutual, etc., Ass'n. v. Moyer, 94 F2d 906 (CCA 9), 9 Alaska Reports, 235, 240 cert. den. 304 US 581;

United Benefit Life Ins. Co. v. Elliott, et al., 11 Alaska Reports 466, 476.

Alaska has a general statute, no other, under which an attorney fee can be allowed as an item of costs, viz.:

“Disbursements allowed to party entitled to costs. Party’s right to witness’ and attorney’s fees. A party entitled to costs shall also be allowed for all necessary disbursements, * * * and a reasonable attorney’s fee to be fixed by the Court.”

ACLA 1949, Sec. 55-11-55.

“And a reasonable attorney’s fee to be fixed by the Court” was included in that statute by amendment in 1947.

ASL 1947, Ch. 84.

The same words in Sec. 1, Ch. 38, *ASL* 1923, were construed by this Honorable Court in

Pond v. Goldstein, 41 F2d 76, 5 AFR 544, 556;

Forno v. Coyle, 75 F2d 692, 5 AFR 758, 766.

Inasmuch as this is a “special proceeding”, Appellants submit that, without specific statutory provision, costs, as stated, do not include an attorney’s fee.

The trial Court allowed attorney fees herein to Appellee although, in its Memorandum Decision (PR 383), it said “the procedure adopted by the City may be somewhat *irregular*” and on July 28, 1954, “I know there have been a *lot of irregularities here. There naturally would be*” (PR 462), (emphasis supplied), and, previously in respect to the trial of January 18, 1952, “No attorney fee was allowed because of irregu-

larities on the part of Yakutat of the kind that encourage litigation'' (PR 30).

It should be borne in mind that although Appellee may be a small village and a second class Alaskan municipality, it has throughout been represented by learned practicing counsel, William L. Paul, Jr., of Juneau and Seattle, and Frederick Paul of Seattle. This proceeding, no more than the suit No. 6302-A, which resulted unsuccessfully to Appellee (PR 157), was not instituted by men ignorant of or unlearned in the law.

The allowed attorney fee of \$748.06 was based upon the fee allowed as in contested lien cases under Local Rule 45, actually under Rule 45 of Uniform Rules of the District Court for the District of Alaska, effective April 30, 1953, adopted by all the District Judges of Alaska. It provides for allowance in a contested lien case of 30% on first \$1000, 15% on next \$4,000, and 5% on next \$5000, etc.

Appellants don't know how the \$748.06 was computed, but assuming without conceding delinquent taxes of \$1988.29 plus \$239.78 (12% penalty on \$1988.29) plus \$1082.91, interest at 1% monthly on \$1988.29 from December 15, 1949, to June 29, 1954, the date of the Order of Sale (PR 388-389) the correct total is \$3310.98, under Rule 45 and the fee would amount to \$646.65 not \$748.06. If the computation is based upon \$1988.29 plus \$239.78 plus \$1189.71 interest at said rate for said period on \$2228.07 (taxes \$1988.29 plus penalty \$239.78) or upon a total of \$3427.78, it would result in \$664.68 not \$748.06.

However it was computed, Appellants submit the trial Court abused its discretion in allowing it in the face of the many irregularities committed by Appellee and that the statutes do not authorize its imposition as a lien upon Appellant Yakutat & Southern Railway's realty.

3. The Order of Sale (PR 389), after holding Appellants delinquent for \$1,988.29 realty taxes, plus 12% penalty thereon, plus 1% interest monthly on said taxes, plus costs of hearing, including an attorney's fee of \$748.06, said "Against which sums Objectors shall have a credit, \$719.94, for costs taxed on the Objectors' appeal to the Court of Appeals."

The trial Court had previously ruled, in denying Appellee's Objections (PR 340) to Appellants' Motion (PR 337-338) to file and for judgment on this Court's Mandate (PR 335-337), that: "The costs taxed by the Appellate Court against the City Applicant cannot be applied or credited by the Applicant upon the taxes, personal or realty, penalty and interest, or any part thereof, which Applicant claims are due to it from the Objectors" (PR 342-343).

In those Objections (PR 340) Appellee had represented to the Court that "in conformity with" this Honorable Court's Opinion of July 8, 1953 (206 F2d 612), it had "applied the funds paid by objectors to the payment of their personal property taxes and their real property taxes, both including penalty and interest, thereby exhausting any liability due on personal property taxes, penalty and interest, and partially paying their real property taxes, *as had theretofore*

been directed by Objectors'' (PR 340). (Emphasis supplied.)

Appellants have found no such direction in this Honorable Court's Opinion, nor did they ever direct such payment.

That \$719.94 is a direct liability of Appellee to Appellants. The trial Court itself held that Appellants were not personally liable for realty taxes in its Opinion in District Court Case No. 6302-A (PR 160).

4. The Order of Sale (PR 388-389) inferentially, although not specifically so stating, approved Appellee's application of the \$1751.75, which Appellant paid Appellee by its *attorney's personal check* with his letter of December 7, 1949, to Appellee's City Clerk (PR 143-145) which Appellee never denied (PR 146), to payment of personalty taxes alone in the manner stated by its counsel on April 28, 1954 (PR 411) or as stated in Appellee's Objections to Form of Judgment (PR 340), because Appellee in its pretended Amended Supplemental Delinquent Tax Roll for 1949, which was made by Appellee's counsel after making those Objections, claims only realty taxes in the sum of 1988.29, and the trial Court based its Memorandum Decision (PR 382-383) and its Order of Sale (PR 388-389) upon that pretended Tax Roll (PR 369-370).

Appellee never denied that its City Clerk on December 10, 1949, acknowledged receipt of that check (PR 145) and that its Treasurer endorsed, presented, and received payment of that check (PR 156-157).

On the document (PR 347) under the columns headed "Date Payment", in the section headed "1949", on the line opposite "Land", not on the line opposite "Personal", are written the words: "Dec. 12, 1949, \$1751.75".

In his letter of December 7, 1949, Appellants' counsel stated that he remitted that check *in full payment of the current year's municipal taxes levied upon the real and personal property of Appellants in accordance with their respective tax returns* previously sent to and acknowledged by the City Clerk (PR 143-144).

The current tax year necessarily was that of 1949 because Sec. 2, Municipal Ordinance (PR 86), ordained Appellee's annual tax year to commence on June first, and, as stated, the document (PR 347) shows it was received for 1949 taxes.

Appellants submit that Appellee, by receiving, collecting and retaining the proceeds of their attorney's check for \$1751.75, remitted to it upon the condition that the \$1751.75 was in full payment of their 1949 taxes, is estopped to maintain that any taxes, either realty or personalty, remain unpaid for the tax year 1949 or to apply the proceeds of that check in any manner other than as directed in their counsel's letter of December 7, 1949 (PR 143-144).

Appellants had the right to direct the manner of application of its payment of \$1751.75.

"In making a payment on account of taxes, the taxpayer has a right to direct its application to a particular tax or to a particular piece or item of

property, and the receiving officer is bound by such direction.”

84 CJS 1250, Taxation, Sec. 627;

61 CJ 970, Taxation, Sec. 1250.

“When a debtor directs the manner of application of his payment, the creditor, if he accepts payment, must apply it as the debtor requests.”

48 CJ 646, Payment, Sec. 90;

70 CJS 261, Payment, Sec. 55.

Appellee should have refunded the \$1751.75 if it did not accept that sum in full payment of Appellants' 1949 taxes.

CONCLUSION.

Wherefore Appellants pray that the Order of Sale (PR 388-389) may be vacated and set aside and the application dismissed because:

1. Appellants were not given a fair, impartial hearing or accorded due process of law or fair opportunity to present their objections and adduce their evidence in support thereof at either the January 12, 1952, hearing or the June 24, 1954, hearing (First Proposition, *supra*; also, Bf. 13,455, pp. 51-63).

2. The trial Court was without jurisdiction because of Appellee's nonperformance of statutory and municipal ordinance requirements in respect both to the Supplemental Duplicate Delinquent Tax Roll (PR 10, 13), which this Court held invalid in its Opinion of July 8, 1953 (206 F2d 612), and the pretended

Amended Supplemental Tax Roll for 1949 (PR 369-370); also, the document (PR 347). (Second Proposition, *supra*; also Bf. 13,455, pp. 64-68).

3. The Order of Sale of June 29, 1954 (PR 388-389), as did the Order of Sale (PR 50-51) of April 25, 1952, disregards uncontradicted, unimpeached, competent evidence and its weight and credibility, and is based upon an *ex parte* affidavit and other incompetent evidence, including Henry's deposition, testamentary and documentary (PR 345-350), and ignores Appellee's failure to prove the listing and assessing by the City Assessor for the tax year commencing June 1, 1949, at their respective true and full values either the realty or the personalty of Appellants (Third Proposition, *supra*; also Bf. 13,455, pp. 78-86).

4. Appellee's witness Henry's evidence, testamentary and documentary (PR 345-350), was incompetent and inadmissible to extrinsically either impeach or show facts not disclosed by either the Supplemental Duplicate Delinquent Tax Roll (PR 50, 51), which this Honorable Court held was invalid in its Opinion of July 8, 1953 (206 F2d 616), or the pretended Amended Supplemental Delinquent Tax Roll for 1949 (Fourth Proposition, *supra*).

5. The trial Court was without jurisdiction to try this proceeding *de novo*, and this Honorable Court's mandate (PR 335-337) of August 19, 1953, issued in Case No. 13,455, and the trial Court's judgment on mandate (PR 339) are *res judicata*, and this Honor-

able Court's opinion of July 8, 1953, in Case No. 13,455, is the law of the case (Fifth Proposition, *supra*).

6. The Order of Sale (PR 388-389) of June 29, 1954, erroneously allowed interest on claimed delinquent taxes; allowed Appellee an attorney fee and made it a tax lien on Appellant Yakutat & Southern Railway's realty; credited the \$719.94, allowed by this Court to Appellants as costs in its Mandate (PR 335-337) of August 19, 1953, upon Appellee's claimed taxes at its claimed valuations, penalty, interest, and costs; and inferentially applied, contrary to Appellants' instructions, their payment of December 10, 1949, to Appellee of \$1751.75, which Appellee retained, in a manner selected by Appellee (Sixth Proposition, *supra*).

Dated, Juneau, Alaska,
February 28, 1955.

Respectfully submitted,
R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

United States Court of Appeals
For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation) and
YAKUTAT & SOUTHERN RAILWAY (a corporation),
Appellants,
vs.

CITY OF YAKUTAT, ALASKA (a municipal corporation),
Appellee.

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
ALASKA, DIVISION NUMBER ONE

BRIEF OF APPELLEE

WILLIAM L. PAUL, JR.
Attorney for Appellee

542 East 94th St.
Seattle 15, Washington

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Attorney for Appellee

542 East 94th St.
Seattle 15, Washington

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United States Court of Appeals

For the Ninth Circuit

LIBBY, McNEILL & LIBBY (a corporation)
and YAKUTAT & SOUTHERN RAILWAY
(a corporation), *Appellants,*

vs.

CITY OF YAKUTAT, ALASKA
(a municipal corporation), *Appellee.*

No. 14652

APPEAL FROM THE DISTRICT COURT FOR THE DISTRICT OF
ALASKA, DIVISION NUMBER ONE

BRIEF OF APPELLEE

PLEADINGS

This case has been before this Court before as No. 13,455. On July 8, 1953, this Court rendered its Opinion ending: "The order of sale is reversed." The basis of the Opinion is that the trial court is without jurisdiction to give final judgment against real property for what may be personal property taxes. The former appeal is reported at 206 F.(2d) 612. The memorandum opinion of June 25, 1954, of the trial court on the new trial is unreported.

On May 6, 1954, appellee objected in the trial court (Tr. 340) to the form of the judgment proposed by appellants on the mandate. The proposed form related solely to costs taxed by this Court on the prior appeal. The ground of the objection was that these costs should run against the remaining liability of appellants. It appeared then that the appellee had clarified the appli-

cation of the money paid by appellants on December 18, 1949, which had been applied generally to reduce the personal and real property tax indebtedness of appellants. This clarification was simply that the \$1,222 personal property tax indebtedness had all along been extinguished, and the balance of the \$1,751.75 paid ran against the real property tax indebtedness for which there would then be a balance due of over \$2,400—thus leaving an amount more than sufficient to absorb the costs taxed on the prior appeal.

On May 10, 1954, appellee moved (Tr. 340) that this case be set down for trial and the trial court granted the motion, setting the trial for June 24, 1954.

On May 10, 1954, the appellee moved (Tr. 341) to strike all the evidence of appellant relating to valuation of property introduced on the former trial, on the ground that the appellants had not exhausted their administrative remedy before the appellee's Board of Equalization, the parties assuming that the appellants had the pleadings upon which to introduce such evidence and would offer to introduce the same evidence on the re-trial as had been introduced on the former trial.

On May 12 (*nunc pro tunc* May 8), 1954, the trial court denied (Tr. 342) appellee's objections to the proposed form of judgment on the mandate on the ground that the appellee's remaining claim for real property taxes against appellant's real property was contingent. The judgment was signed (Tr. 339).

On May 24, 1954, after notice, appellee took the deposition (Tr. 345-350) of the appellee's city clerk to iden-

tify the segregation between personalty and realty appearing in the original assessment roll. And noticed the filing thereof on May 25, 1954.

On June 23, 1954, pursuant to leave of court (Tr. 383-383), appellee filed its amended supplemental delinquent tax roll for 1949 (Tr. 369). This shows a claim for balance due of real property taxes, penalty and interest against real property owned by appellant.

On June 24, 1954, the case went to trial (Tr. 437 *et seq.*) upon the amended application, appellant's original and subsequent objections thereto preserved or renewed. The parties offered all the evidence respectively adduced by them at any time; and appellee offered the deposition of its city clerk, and the trial court received it in evidence.

On the trial the court made its memorandum decision on June 25, 1954 (Tr. 382) in favor of appellee, including granting the motion to strike all of appellant's evidence of valuation of its realty.

On June 29, 1954, the trial court made a new order of sale relating to real property taxes, penalty, interest and costs due against real property of appellant, from which this appeal is taken (Tr. 388).

The order of sale allows a credit of \$719.94 for costs taxed by this Court on the former appeal.

Appellant objected to everything on numerous grounds, repeating some objections as many as ten times. All objections were overruled by the trial court. These are not set forth here because within the doctrine of the law of the case or so patently within the trial court's discretion as not to be worthy of mention.

STATEMENT OF THE CASE

No statement of facts is made on this second appeal for the period prior to May 6, 1954.

On May 6, 1954, by commitment in open court, appellant clarified the application of the money theretofore paid by appellant from a partial payment of aggregate of personal and real property taxes (Pr. 143) to a payment first on the personal property taxes in full, and the balance of the money to reduce the real property taxes, penalty and interest to the amount here in controversy, as shown by the amended supplemental delinquent tax roll filed June 23, 1954 (Tr. 369).

Issue was joined by appellant renewing all defenses. This does not clearly appear insofar as the original objections (Tr. 15-28) are concerned, but the entire context of the record assumes that appellant's original objections were preserved to it and sufficient to it as against the amended application.

At the trial on June 24, 1954, appellee introduced in evidence the deposition (Tr. 347) of the city clerk identifying a photostatic copy of the original combined assessment-tax-delinquency tax roll for 1949 (Tr. 405) as well as the entire previous record except portions relating to property valuation subject to the motion to strike. The assessment roll identified shows a segregation between realty and personalty in the amounts upon which the computation was made of taxes, penalty, interest and costs due on appellant's real property in the order of sale of June 29, 1954.

At the same time, all the evidence adduced by the appellants on the previous trial (Tr. 243-311, 113-143)

was offered by appellants and was received (Tr. 450 *et seq.*) subject to a ruling on appelle's motion to strike (Tr. 448).

The entire participation of the appellants before the City's Board of Equalization consisted of a naked claim on December 7, 1949, of excessive valuation (Tr. 143). Appellants made no claim that the real property values were fraudulently fixed.

The appellants' evidence of valuation was stricken by the trial court on June 25, 1954, in its memorandum opinion (Tr. 383) "because not presented to the Board of Equalization." While the motion to strike had also sought to exclude the evidence previously adduced by appellants in the form of the December 7, 1949, letter (Tr. 143) relating to appellants' contention of compromise, the trial court did not act on such portion of the motion because it had already been disposed of adversely to the appellants on the prior opinion (98 Fed. Supp. 1011).

The June 29, 1954, order of sale in effect refuses to disturb the valuation fixed on December 10, 1949, by the Board of Equalization. These are (Tr. 347) "Land \$11,000, Improvements \$176,625." The millage rate of 13 mills is shown, as well as the total amount of tax due. From this information it is merely computation to figure the tax due from each classification.

Because the personal property valuation is fixed at \$94,000 (making a tax of \$1,222), the payment received by the City and applied on December 18, 1949, of \$1,751.75 pays the personal property tax in full, and leaves \$529.75 toward payment of the real property

tax of \$2,439.13 plus penalty of 10% on the balance, plus interest at 1% monthly on the principal balance. This is essentially the same application of appellants' payment as was originally made.

On December 7, 1949 (Tr. 143-144), the appellants directed (by defendants' attorney, R. E. Robertson) the application of the payment of the \$1,751.75 to payment of taxes levied upon real and personal property.

The order of sale from which this appeal is taken is for the balance due of real property taxes plus penalty and interest on the basis of the foregoing computation, and costs.

QUESTIONS PRESENTED

1. Because on the former appeal this Court simply "reversed" the former order of sale, the appellee was entitled to a new trial on the amended application.

2. The trial court held a new trial.

3. The Doctrine of the Law of the Case is applicable and enabled appellee to present the testimony of the city clerk at the new trial, giving the evidence of segregation of realty and personalty that the Court of Appeals was unable to find after searching the entire record on the former appeal.

4. The trial court's striking of appellants' evidence of valuation because appellants had not exhausted their administrative remedy before the Board of Equalization was proper.

5. The trial court had previously ruled that appellants' evidence of valuation did not sustain an issue of bad faith.

6. Allowance of costs is discretionary with the trial court, the trial court has exercised its discretion, there is no claim that there has been an abuse of discretion.

These questions as here presented we think rephrase the more important aspects of appellants' case on appeal—they are not phrased in counsel's manner or order. The present statement is made for what we believe the sake of clarity and logical order.

ARGUMENT

1. Because in No. 13455 this Court simply “Reversed” the Former Order of Sale, the Appellee Was Entitled to a New Trial on the Amended Application.

This appears to be largely appellant's fifth proposition.

We have characterized this as a proceeding on an amended application. Apparently this is the same thing that the trial court had in mind for the purposes of the second trial on June 24, 1954, because the trial went ahead over appellant's objection that appellee had not filed a “new duplicate delinquent tax roll” as stated in the order of June 12, 1954 (Tr. 365).

The original application (Tr. 1) had attached to it a sort of exhibit consisting of the main delinquent tax roll (of all property except appellants') with a notice that the roll would be presented to the District Court for order of sale. Later a supplemental exhibit was added (Tr. 9), consisting of excerpts from the tax books of appellee and a similar notice.

The original application was not itself amended as a document except in the sense that one of its exhibits

was amended on June 23, 1954, by appellee furnishing the court complete excerpts from the original delinquent tax roll in a document entitled "Amended Supplemental Delinquent Tax Roll."

This is desirable from the viewpoint of giving the court clear papers, perhaps they could have been even clearer by appellee filing a completed document of amended application. But the trial court got along with what it had, and there was no claim from appellants of confusion. Appellee took the view (Tr. 440 *et seq.*) that it was accommodating the trial court in this filing of the amended exhibit and complying with the trial court's order, but that in view of the Opinion of this Court the amendment to segregate property could be made at any time by any means before the trial closed.

At the trial of June 24, 1954, ordered then to be held by the trial court on May 10, the parties produced all the evidence and issues of law and fact they wanted to produce. This included all the evidence adduced at the two previous trials (Tr. 442, *et seq.*), the deposition of the city clerk identifying the photostatic copy of the original combined assessment-tax-delinquency roll (Tr. 347), and the admissions of counsel (Tr. 379).

It is our position that an unqualified reversal automatically permits a new trial. A specific direction to have a new trial is unnecessary.

Our examination of decisional authorities indicates that the editors of American Jurisprudence state the rule quite well. At Vol. 3, Appeal & Error, Sec. 1240, they say:

"As a general rule, an unqualified reversal en-

titles the appellant as a matter of right to a new trial, entirely unembarrassed by anything which occurred at the former trial * * *

“Generally when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues, the whole case is tried anew, in pursuance of the principles of law declared in the opinion of the appellate court, which must be regarded as the law of the case on the second trial * * *

“While the effect of the reversal of a judgment is to vacate or set it aside, it does not include any other affirmative action, unless specially directed by the reviewing court. Hence, the reversal of a judgment in favor of a party and the remanding of the cause generally do not warrant the entry of a judgment against him and in favor of his adversary * * *

“Sec. 1241. AMENDMENT OF PLEADINGS AFTER REMAND. If a cause is remanded without specific directions, or with general directions for a new trial either upon an affirmance or reversal, the lower court has, as a general rule, the power to permit amendments and the parties are free to make such proper amendments to the pleadings as the trial court in its discretion may allow.”

This rule has been with us quite a while. For instance it is stated at 98 Am. St. Rep. 128 on the question of “Effect of the reversal”:

Upon the reversal of a judgment without qualification on the part of the reversing court, it must, for most purposes, be treated as no longer in existence. * * * The appellant is restored to the posi-

tion in which he was before the judgment was pronounced against him (Citations). To reach this end it is not necessary that any further order or proceeding be taken in the trial court (Citations).

To support the rule, the editors cite the following cases:

In *Landis v. Interurban Ry. Co.*, 173 Iowa 466, 154 N.W. 607 (1915), the court on the former appeal had rendered an opinion ending "For the reasons pointed out the judgment must be and it is reversed." This we submit is exactly similar to the instant case. The Iowa Supreme Court held:

"These cases (citing from Iowa, RCL, Colorado, Ohio and Illinois) generally hold that, where a law case is reversed on appeal and remanded to the lower court for further proceedings, the case goes back to the trial court and stands on the issues as if the former trial had not taken place."

A similar situation existed in *De Palma v. Weinman*, 15 N.M. 68, 103 Pac. 782 (1909), where on the first appeal the court had rendered an opinion ending "Remanded to that court for further proceedings in accordance with the opinion."

An analogous situation appears in *Stehlau v. John Schroeder Lumber Co.*, 152 Wisc. 589, 142 N.W. 120 (1913), where the former appeal had gone of on a judgment of non-suit. The court had to determine whether the new trial was indeed "new" in facts, or whether it was merely a new argument on the same old facts.

We are, of course, all familiar with the old demurrer situation, now characterized as a motion to dismiss.

Against a contention of *res judicata*, the court in *Case v. Hoffman*, 100 Wisc. 314, 72 N.W. 390 (1897), held:

“Where the Supreme Court determines a demurrer to a complaint, any judgment based on facts assumed to exist in the opinion, but which are not alleged in the complaint, is not *res judicata*. The reasons set forth in the opinion of the Supreme Court are not *res judicata*, the judgment makes only that which was in issue decided *res judicata*.”

The extremes to which appellant's contention of *res judicata* or the law of the case can be carried are illustrated in *Barber v. Hartford Life Insurance Co.*, 279 Mo. 316, 214 S.W. 207, 12 A.L.R. 758 (1919). This case had been before the U. S. Supreme Court at 245 U. S. 146 where the judgment was reversed. The mandate contained, as here, the usual words:

“Such execution and further proceedings may be had in said cause, in conformity with the judgment and decree of this court above stated as, according to right and justice, and the Constitution and Laws of the United States, ought to be had therein, the said writ or error notwithstanding.”

The case found its way back to the trial court, a new trial was had and was again before the Missouri Supreme Court for a holding:

“Our judgment remanding the cause to the Johnson Circuit Court for retrial was in full accord with the mandate of the Supreme Court of the United States, and gave the trial court full jurisdiction, not only to retry the issues of fact presented by the pleadings in the first trial in accordance with the principles announced in the judgment and opinion of the Supreme Court of the United States, but also to reframe those issues as provided by our

code. A retrial does not mean a mere replica of the former trial, but is a trial, as the term implies, in the light of experience and knowledge which may have been acquired in the interval."

The case was affirmed by the Supreme Court in 1921 at 255 U.S. 129.

Indeed the rule as stated by the editors of American Jurisprudence is so well stated that the 5th Circuit quotes and relies upon it at *Roth v. Hyer*, 142 F.(2d) 227 (1944), where on the former appeal (133 F.(2d) 5) the cause had been "reversed for further and not inconsistent proceedings." *Certiorari* was denied by the Supreme Court at 323 U.S. 712 (1944).

In *Pyramid National Van Lines v. Goetze*, decided by the Municipal Court of Appeals for the District Court of Columbia, 66 A.(2d) 693 (1949), the former appeal had ended with an opinion "Reversed" (65 A.(2d) 595). The mandate contained the usual words of remand. After a new trial and on a second appeal the court held:

"When the mandate of an appellate court is filed in the lower court, that court reacquires the jurisdiction which it lost by the taking of the appeal. *United States v. Howe*, 2nd Cir., 280 Fed. 815, *cert. den.* 259 U.S. 585; *Pope v. Shannon Bros.*, 195 Ark. 770, 114 S.W.(2d) 1; 3 Am. Jur. Appeal & Error, Sec. 1229. The remand for further proceedings is always made when the record does not enable the reviewing court to determine the rights of the parties. 3 Am. Jur. Appeal & Error, Sec. 1210. Where a judgment previously reversed without further order, the mandate to that effect does not preclude any other affirmative action unless specifically directed by the appellate court. 3 Am. Jur. Appeal &

Error, Sec. 1184. Thus in cases of reversal and remand for further proceedings, the general rule is that the lower court is free to make any order or direction in further progress of the case not inconsistent with the appellate decision as to any question not presented or decided by such decision. 3 Am. Jur. Appeal & Error, Sec. 1233."

Our views are supported by *Rogers v. Hill*, 289 U.S. 582 (1933) where the words were used:

"Moreover if the (U. S. Circuit) court intended to direct dismissal (on the former appeal), it is to be presumed that it would have done so unequivocally and directly by means of language, form of decree and mandate generally employed for that purpose."

The question may arise in several different ways, such as where a successful appellant on the first appeal seeks too broad a judgment on the mandate, objections to amendments to the pleadings on the new trial, hearing on a writ of mandamus in the appellate court on the meaning of its mandate, etc. And the rule is uniform. See *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920); *Re Sanford Fork and Tool Co.*, 160 U.S. 247 (1895); *Les v. Alibozek*, 269 Mass. 153, 168 N.E. 919, 66 A.L.R. 1094 (1929); *Weber v. E. J. Larimer Hardware Co.*, 234 Iowa 1381, 15 N.W.(2d) 286 (1944) (citing 3 Am. Jur. Appeal & Error, Sec. 1241, and 5 C.J.S., Appeal and Error, p. 1522, Sec. 1969 (b)).

The only limitation on the trial court is that it shall exercise its sound discretion to permit amendment of the pleadings within the frame work of the appellate opinion.

In the demurrer or motion to dismiss situation, this

means that the defendant, after the appellate court's reversal of a judgment of dismissal, should be permitted his defense. See *Chase v. United States*, 256 U.S. 1 (1920). And this includes abandoning the earlier defense altogether and substituting an entirely new defense, if such switch is advisable to the trial court, citing *Messenger v. Anderson*, 225 U.S. 436.

The language of the U. S. Supreme Court in *Wells Fargo & Co. v. Taylor*, 254 U.S. 175 (1920) is particularly instructive:

"It is urged that the decision of the circuit court of appeals on the first appeal was final, in that it disposed of all questions in the suit and left nothing open to the district court but to dismiss the bill. * * * It (the court of appeal's first decision) turned on the sufficiency of the bill, and on that alone. The district court had held the bill sufficient when challenged by a demurrer. The circuit court held it insufficient and for that reason reversed the decree and remanded the suit. Had the district court taken that view when acting on this demurrer, it undoubtedly could, and probably would, have allowed an amendment curing that defect. Could it not equally allow the amendment after the circuit court of appeals pointed out the defect and remanded the suit? It, of course, was bound to give effect to the decision and mandate of the circuit court of appeals; but that court did not order the bill dismissed, or give any direction even impliedly making against the amendment * * * we think * * * that the district court was left free, in the exercise of its discretion, to permit the amendment."

Indeed, the amendment power of our courts is so broad, that we suggest that this court on the former

appeal searched the record for facts that would permit an amendment—did the entire record contain sufficient facts to enable elimination of personal property. If such facts had been found anywhere in the record, the amendment would have automatically been allowed on the former appeal. Naturally this makes for ultimate justice and avoids litigation. The highest court of Massachusetts followed a similar procedure in *Les v. Alibozek*, 269 Mass. 153, 168 N.E. 919, 66 A.L.R. 1094 (1929).

While there was no finding in the *Les* case, *supra*, that the trial court had abused its discretion in refusing to allow the amendment, appellate courts are sometimes given to hinting rather broadly that the amendment should have been allowed. For instance, in *Weber v. E. J. Larimer Hardware Co.*, 234 Iowa 1381, 15 N.W.(2d) 286 (1944), a personal injury action, the plaintiff had overlooked alleging future loss of earnings and offered to amend during the course of trial, which offer was denied. Plaintiff appealed stating this refusal as one ground. The appellate court held that it would not rule on this ground of appeal because it was remanding the case on other grounds and

“the court might well have permitted plaintiff to amend. We have repeatedly held that to allow an amendment, especially one like this, is the rule and to deny it is the exception. * * * This is the rule, generally. 3 Am. Jur. 737, Sec. 1241; 5 C.J.S., Appeal and Error, p. 1522, Sec. 1969(b).”

See also for a similar situation *Piechota v. Rapp*, 148 Neb. 443, 27 N.W.(2d) 682 (1947), where same editorial citations given.

On the other hand, of course, the trial court in exercising its sound discretion to allow amendments on the retrial, should not go so far as to deprive the defendant of a trial on the amendment. For instance, in *Kern v. Kelner*, 75 N.D. 703, 32 N.W.(2d) 169 (1948), the case had come back from the appellate court. plaintiff moved for leave to file a supplemental complaint, defendant moved to dismiss on the mandate. The trial court granted leave to file the supplemental complaint, denied the motion to dismiss, and pre-emptorily granted judgment for plaintiff. On the second appeal it was held:

“When a cause is remanded generally to the lower court for further proceedings and where there are no directions to the contrary, the lower court has authority where the nature of the case makes that necessary or proper to grant permission to amend the pleadings or to file supplemental pleadings. 3 Am. Jur., pp. 737, 739, Sec. 1241; 5 C.J.S., Appeal and Error, Sec. 1969, p. 1522; *Rogers v. Hill*, 289 U.S. 582, 587; 324 U.S. 154; *Davis v. Stewart*, 67 Cal. App.(2d) 415, 154 P.(2d) 447, 449.”

There thus appeared no opportunity for defendant to answer the supplemental complaint—this was carrying the effect of the mandate too far.

We are not confronted with that situation here, for all parties and the trial court regarded appellant's answer to the original application as running against the amended application. Plus such further objections as appellant wanted to make.

We suggest that what appellant has been trying to do is to try to take advantage of the statute of limitations. They want not to be confronted with an amended complaint which would have preserved the case. They

wanted the city clerk to make up a new delinquent tax roll, with notice of presentation to court, post it for thirty days, and file it with a new application in the District Court—as a new case commenced almost five years after delinquency arose on December 15, 1949. Objectors would then have raised an affirmative defense as provided Section 55-2-7 A.C.L.A. 1949:

“WITHIN TWO YEARS—Third. An action upon a liability created by statute * * * .”

On the other hand, the appellee wanted to do just what this court did—supply from some part of the entire record, any part at all, evidence of segregation.

At page 5 of the Opinion (206 F.(2d) 612, 616), this court said:

“ * * * If the realty and personalty of appellants were ever separately assessed, as the statute requires, that fact does not appear in the record. Since there is nothing in the record to indicate * * * , if properly assessed, that any specific amount of taxes thereon is unpaid, the city has made no case against appellants * * * ”

We can only deduce from this Court's Opinion, that if this Court had been able to find in the former record what we have now supplied in this record literally, the July 8, 1953, Opinion would have been an affirmance of the order of sale. The segregation does not have to appear in the duplicate delinquent tax roll, or its supplement, or its amended supplement—if the segregation can be found from any evidence in the entire record, the proceeding stands. On this point, the trial court and appellee did in effect only what this court told us to do.

As a matter of actual practice in Alaska, and we think

in most cities, there is no such thing as a separate document to be called a "delinquent tax roll." Rather, there is one or a series of books containing all property and tax information and action, too bulky to be posted or presented to court. For Yakutat, typically, the excerpt identified on deposition (Tr. 347), shows property description and classifications, name of owner, tax year, assessment valuations, mileage rate, taxes, and balance of taxes due or delinquency. Alaska practice since the Organic Act of 1913 has been to extract information from this combined assessment-tax-delinquent tax book, and present such excerpts with an application to the District Court after notice for judgment of order of sale.

The application is believed necessary because the "delinquent tax roll" in itself does not ask the court to do anything. There is no objection here that the application in itself is not fully sufficient.

The application is in essence a complaint. The complaint has been amended, not by substituting a new cause of action, but by separating a surplusage relating to personal property out of the complaint, and leaving that portion relating to real property.

This is in the nature of a simple motion to amend the complaint to conform to the facts proved, and can be made at any time before the case is finally disposed of.

No doubt the readiness this court had to find evidence justifying the possible amendment is further founded in our statute Sec. 16-1-124 A.C.L.A. 1949:

" * * * and no objection to the valuation of the property, the manner of the assessment and levy

of the tax, or any of the subsequent proceedings shall be entertained by the court which does not effect the substantial rights of the party interposing the objection * * *

2. The Trial Court Held a New Trial.

We hope counsel is not drifting over into an idea that appellants had no answer or retrial below at all. This new view and "contention" turns around our use of the words "partial new trial," and are quoted from Tr. 439-440 by counsel as follows:

"THE COURT: Well, your position now is that these steps, that are set forth in the statute that must be taken with reference to the preparation and the presentation of the delinquent tax roll, need not be taken in the case of an amended tax roll? That is the thing I am in doubt about.

MR. PAUL: Yes, I think so, Your Honor."

And counsel pursues the idea at page 15 of his brief:

"The pretended Amended Supplemental Delinquent Tax Roll for 1949, and it was not served until June 23, 1954, too late for Appellants to obtain any new evidence."

And again:

"could not foresee the necessity of obtaining any further evidence for the hearing of June 24, 1954."

Because the latter quotation appears in a sentence 190 words long (not counting parenthetical material referring to the record), we might be mistaken, but the quoted material to us does not make sense in the context of the record.

It is of course unfortunate that we used the words "partial new trial." We point out that the phrase was

used only in a descriptive sense of a small stage of the proceedings—certainly not in a sense to define the entire proceeding. Everyone understood that all objections and evidence counsel ever had had or had renewed and made for the first time ran against the city's case on the new trial. This was particularly thrown up to counsel by the trial court at Tr. 455-456:

“THE COURT: Well, then, as I understand it, the evidence you want to introduce in support of these latest objections is evidence that had not been previously introduced; is that it? If it has been previously introduced—

MR. ROBERTSON: I haven't had an opportunity to put in any evidence on that, Your Honor.

THE COURT: But my question is whether, if all you want to do is duplicate what has been done before, I don't know why the court couldn't consider it as evidence in this case.

MR. PAUL: As to that, Your Honor, the evidence was introduced, Your Honor. All evidence introduced in the previous case, except that relating to valuation, to which I filed a motion to strike, I regard as part of this case.

THE COURT: Well, let the record show then that the evidence hereinbefore introduced in support of objections such as are made on this particular proceedings upon the so-called supplemental or amended tax roll may be considered in support of objections presently made. That will serve your purpose, will it not?

MR. ROBERTSON: Yes. But I can't agree with the motion to strike the valuation * * *

In other words, Mr. Robertson for appellants in effect

offered all the evidence of the previous trial at this trial insofar as proving in full any defense he had to make now. If he had wanted literally a trial *de novo*, without the generous stipulations of any sort by appellee, he would have taken all his depositions from Chicago all over again to say the same thing.

Again at Tr. 417 on the question of preservation of testimony of the city clerk (at that moment in Juneau personally), the appellee stated in the stipulation that all objections and evidence were preserved:

“THE COURT: Well, the court is going to leave here before the next motion day. As I understand it, the question is whether we can start with the assessment roll or will have to go beyond that. What about that?”

MR. PAUL: Go beyond the assessment roll?

THE COURT: Yes; and start it some place before that.

MR. PAUL: I don't think so, Your Honor. We have taken very extensive testimony already, and that is part of the record * * *

What counsel had in mind and in effect so stated (Tr. 456) was not that he was being deprived of opportunity to answer the amended application and a trial upon such answer—because he had all that already. What counsel feared related only to the competency of his evidence of valuation, for he continued (Tr. 456):

“I can't come in here myself and prove that.”

Of course, he would not because he would be an incompetent witness. But appellee's motion to strike appellant's evidence of valuation, which evidence could only have been adduced on the original objections running

against the amended application, was not based on a ground of competency—as a matter of fact it was entirely competent evidence as far as it went. Rather, the motion to strike was based on a ground of relevancy and materiality—a purely legal issue.

And so we finally agreed (Tr. 458) that counsel was offering all the evidence adduced on the first trial as fully stating his position on valuation.

We admit that the pleadings could have been set up in nicer and neater order. But the realities of the situation are that all issues of fact and law are stated in writing or in open court at one time or another and the parties adduced all the evidence they desired, reaching the focal point of the trial of June 24, 1954.

3. The Doctrine of the Law of the Case Is Applicable and Enabled Appellee to Present the Testimony of the City Clerk on June 24, 1954 Providing the Evidence of Segregation of Realty and Personalty that this Court Could Not Find after Searching the Entire Record on the Previous Appeal.

This point was argued below at Tr. 445 *et seq.* It appeared that there was evidence of segregation for the 1948 tax proceedings, but these were never before this Court.

For the 1949 tax proceedings involved in these appeals, this Court searched the entire record and was unable to find such segregation. See Argument on Rehearing denied, Aug. 31, 1953.

Accordingly, no useful purpose could be served by remanding the case with specific directions on what order of sale to enter or not enter; for there were no

facts in the record to enable segregation, or to show that there had ever been segregation, or that anything remained unpaid on the realty if there had been segregation.

In every situation, it is a problem to determine what issues of law and fact are encompassed in an application of the Doctrine of the Law of the Case. We assume that all such issues decided expressly or by necessary implication are affected by the Doctrine.

Those issues of law and fact which have been decided by necessary implication of a decision are those we must assume as having been disposed of upon the application of the Doctrine of Judicial Reticence—that a court will not decide issues unnecessary to dispose of the case.

The July 8, 1953, Opinion decided the former appeal at a point very late in the proceeding. At least chronologically then, we must assume that this court before examined and decided adversely to appellant all their objections here raised as their Second Proposition (Brief, p. 18, Tr. 15-28, resummarized as 43 objections at Tr. 42-49). Some portion of their First Proposition is intermingled (Brief, p. 14).

Thus the first chronological step is the placing of property on the assessment roll. This was done by the Board of Equalization simply by copying the work of the previous year of the assessor. Necessarily this court held this informality as one not affecting the substantial rights of appellants.

Indeed, this court said: “Ordinarily the errors noted would not require reversal of the order in *toto*,” and

then goes on to consider the inability of this court to find a segregation of realty and personalty.

It is true that this court posed what first appears to be a hypothetical situation of assuming all the other errors to be overruled when it used the words: "If we should examine the other questions raised by appellants and resolve them in appellee's favor," etc. But we submit that this is merely a manner of speaking and does not pose a hypothetical situation at all—it is merely manner of speaking to pose the ultimate question. We submit that the entire paragraph should be regarded as a unit requiring the application of the Doctrine of the Law of the Case upon every step in the tax procedure up to the instant of the signature of the first order of sale. And in effect this is exactly what this court did—it regarded the application and delinquent tax roll as amendable from *any* of the evidence adduced by the parties in the entire record. And the only item needing amending was the segregation of realty from personalty. If the trial court had been able to do this at the last instant of taking evidence before the signature of the first order of sale, we must assume that the trial court would have been justified in doing what this court tried to do—allowed the amendment and made an order of sale for real property taxes against real property.

As the deposition of the city clerk shows (Tr. 345), the realty was separately assessed originally. The defect occurred in the first trial and appeal when the copy of the assessment-tax-delinquent tax record was presented to the trial court—this copy neglected the segregation.

Appellants objected to the taking of this deposition, the objections were overruled in plenty of time for appellants to propound cross-interrogatories. Appellants propounded no cross-interrogatories.

This evidence enabled the trial court to enter a judgment in the form of an order of sale for a balance due on real property taxes due on real property.

Having in mind, it is our position that all the other technical objections cannot now be reconsidered, because the Doctrine of the Law of the Case is applicable.

This Doctrine is adequately stated at 5 C.J.S., Appeal and Error, p. 1267, Sec. 1821:

“As a rule of general application, where the evidence of a second * * * appeal is substantially the same as that on the first * * * appeal, all matters, questions, points or issues adjudicated on the prior appeal are the law of the case on all subsequent appeals and will not be reconsidered or readjudicated therein.”

In a demurrer situation, this court applied the rule by holding in *Freeman v. Smith*, 62 F.(2d) 291 (1932) that the answer filed in the trial court raised immaterial issues.

In what we believe to be a somewhat analogous situation, this court applied the rule in *City of Seattle v. Puget Sound Power & Light Co.*, 15 F.(2d) 794 (1926), *cert. den.* 273 U.S. 752.

The decision on the first appeal herein may be characterized as one of lack of knowledge on the issue of segregation; hence the doctrine does not apply to appellee in making the amendment to the application and supplying the additional evidence.

- In re Baird's Estate*, 223 Pac. 974 (Calif., 1924);
- Madsen v. Le Clair*, 13 P.(2d) 939 (Calif., 1932);
- Aldering v. Allison*, 83 N.E. 1006 (Ind. 1908);
- International Fuel, Etc. v. Donner Steel Co.*, 223 N.Y.S. 110 (1927);
- Royal Ins. Co. v. Caledonian Ins. Co.*, 187 Pac. 748 (Calif., 1920).

For this reason, we do not answer most of appellant's points, for they have already been decided adversely to them on the former appeal.

4. The Trial Court's Striking of Appellants' Evidence of Valuation Because Appellants Had Not Exhausted Their Administrative Remedy Before the Board of Equalization Was Proper.

Appellee's motion to strike all of appellants' evidence of valuation was made for the first time on the second trial. The motion was made in writing on May 10, 1954 (Tr. 341), which is in plenty of time for appellants' to have countered it with more evidence. However, the motion was heard on the evidence already offered.

The only showing appellants could make of exhausting their administrative remedy was an appearance by letter before the Board of Equalization on December 10, 1949 (Tr. 143-144). This makes the naked claim:

“On behalf of each of them (appellants herein) I hereby protest the assessment and taxation of their properties at any higher valuations than shown in these returns so heretofore sent you * * *

they show a total valuation (of realty and person-
alty) of \$137,500 * * * (Appellants) make tax re-
turns upon * * * correct and proper valuations
* * * ”

At this time appellee had in force an ordinance re-
quiring application to be made either in person or in
writing for a reduction of assessment, to enable the
Board of Equalization to examine the property owner
thereon. Sec. 7 (Tr. 90) of the ordinance requires that
the application state the facts upon which the applica-
tion is based.

It is our position that appellants made no applica-
tion, or that if the December 7, 1949, letter is an appli-
cation then it stated no facts but merely a claim. In
either case the letter could properly be disregarded.
Properly so, this made no impression on the Board of
Equalization (Tr. 231).

The rule is stated at 84 C.J.S. Taxation, p. 1076, Sec.
553:

“Generally, questions not raised and properly
preserved for review before the reviewing board
or officers will not be considered on a review of the
decision of the board on appeal.”

This expression of the rule, so widely applied in the
field of administrative law, is confirmed by the follow-
ing decisional authorities: *Commercial Merchants Na-
tional Bank & Trust Co. v. Board of Review of Sioux
City*, 229 Iowa 1081, 296 N.W. 203; *Commissioner of
Corporations and Taxation v. Boston Edison Co.*, 310
Mass. 674, 39 N.E.(2d) 584 (1942); *Archer-Daniele-
Midland Co. v. Board of Equalization of Douglas Coun-
ty*, 154 Neb. 632, 48 N.W.(2d) 756 (1951); and *Swet-*

land Co. v. Evatt, 139 Ohio St. 36, 37 N.E.(2d) 601 (1941).

Appellee has provided for a hearing in a way typical in Alaska, and perhaps typical all over the United States, and the entire procedure of due process is thus satisfied. *Hodge v. Muscatine County*, 196 U.S. 276; *Henry v. Manzella*, 356 Mo. 305, 201 S.W.(2d) 457 (1947); *People v. Skinner*, 18 Cal.(2d) 349, 115 P.(2d) 488 (1941). If the appellants think fit to commence to participate in this procedure (thus confessing they have adequate notice) but rely solely upon their technical objections in the face of our statute (Sec. 16-1-124), they have waived their hearing on the merits and should now not be considered to be asking our courts to usurp the functions of the Board of Equalization. Mere overvaluation is insufficient to overthrow an order, otherwise our courts would be converted into assessing boards. *Johnson v. Johnson*, 92 Mont. 512, 15 P.2d 842, 845 (1932).

Certainly no issue was raised to the Board of fraud, illegality, malicious or arbitrary use of powers. It is certainly not the same to say that a valuation is excessive. *Stone v. City of Dallas*, 244 S.W.2d 937 (1951). Nor is marked inequality. *Rancho Santa Margareta v. San Diego County*, 135 Cal. App. 134, 36 P.2d 716 (1933), at p. 725.

5. The Trial Court Had Previously Ruled that Appellants' Evidence of Valuation Did Not Sustain an Issue of Bad Faith.

The first time we see anything even approaching fraud, illegality, malicious or arbitrary use of the pow-

ers of the Board of Equalization (84 C. J. S. Taxation, p. 1051) are in the original objections of appellants filed January 8, 1952 (Tr. 21-22). There first appears a charge of "bad faith" in the appellee fixing the assessment value and not equalizing. This charge is coupled with one that the value was fixed by Felix Toner, whom we all knew to be a highly competent engineer and well qualified to fix values of property ever since 1945 (Tr. 174-178). As such, of course, the charge was not seriously taken, nor was it pursued by the appellants at any of the court hearings.

Since there is no direct evidence of bad faith, appellants are relegated to the difference in valuations as constituting *per se* malice, although they have not alleged even that for 1949 (Tr. 21). But even from this view, appellants have not carried the burden of proof, for appellee adduced the evidence of the engineer Toner (Tr. 173 *et seq*) based on his examination of the property shortly after the Board of Equalization fixed the value—Toner's valuation was even higher than the City's. The trial court on the first trial found appellant's evidence insufficient to sustain its burden of proof (Tr. 41) of bad faith.

6. Allowance of Costs Is Discretionary with the Trial Court, the Trial Court Has Exercised Its Decision, There Is No Claim that There Has Been an Abuse of Discretion.

This is the principal part of appellants' sixth proposition.

Counsel's position here seems to us to be somewhat confused. He advances, wholly without citation, the

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IN THE

United States Court of Appeals

For the Ninth Circuit

LIBBY, MCNEILL & LIBBY (a corporation)
and YAKUTAT & SOUTHERN
RAILWAY (a corporation),

Appellants,

VS.

CITY OF YAKUTAT, ALASKA (a municipal corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

R. E. ROBERTSON,

ROBERTSON, MONAGLE & EASTAUGH,

P. O. Box 1211, Juneau, Alaska,

Attorneys for Appellants.

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Appellee.

APPELLANTS' REPLY BRIEF.

STATEMENT OF PLEADINGS AND FACTS.

Appellee neither in his Statement of Pleading (Appellee's Bf. 1-3) nor in his Statement of the Case (Appellee's Bf. 4-6), criticizes Appellants' Statement of Pleading and Facts (Main Bf. 2-12), although abstaining practically in the entirety from mentioning Appellants' Pleadings or Evidence.

The word "Appellant" (Appellee's Bf. 4, line 3) is incorrect. It should be "Appellee", who purportedly clarified at different times its application of Appellants' remittance of \$1,751.75 on December 7, 1949,

(PR 143-145), i.e.: to exhausting any liability for personal property taxes, penalty, and interest; and partially paying real property taxes (PR 340); applied it to personal property taxes and gave credit for costs (PR 411).

Appellants asserted the bad faith of the assessment and nonequalization as well as the overvaluation and overassessment thereof as early as September 25, 1951, and at no time paid the \$1751.75 as a compromise but tendered it as full payment (PR 21-22).

Sec. 16-1-124, ACLA 1949 (Appellants' Main Bf. #13,455, pp. 11-12) specifically provides that bad faith, nonequalization, overvaluation and overassessment are grounds for objection to the assessment, tax, or order of sale.

APPELLEE'S PETITION FOR A REHEARING.

At the outset Appellants submit that Appellee in reality seeks herein to persuade this Honorable Court to reverse its decision of August 18, 1953, in Case No. 13,455, (206 F.2d 612), denying Appellee's prayer in the latter's Petition for Rehearing (p. 8, Case #13,455), namely:

"We respectfully urge the Court to grant a rehearing of the above matter and that upon a rehearing the court interpose the bar of the ordinance prohibiting the tax-payers, appellants herein, from urging objections which were not urged to the Board of Equalization, and, therefore, to sustain the judgment of the lower court

and failing the foregoing, that this cause be remanded for a segregation of the tax on real and personal property and that an order of sale be allowed as to the real property.”

ARGUMENT.

Appellants have read all of the cases cited by Appellee, except one which they were unable to locate. Those cases are too numerous to individually analyze in the limited space of this Reply, but Appellants submit that those of them that are pertinent don't destroy but in principle support Appellants' contention that the Order of Sale of June 29, 1954 (PR 388) is as invalid as the Order of Sale of April 25, 1952 (PR 50).

This Court in *City of Seattle v. Puget Sound Power & Light Co.*, 15 F.2d 794, held that its decision controlled the lower court after the case had been remanded as well as the appellate court on a second appeal unless between the two decisions a change had been made in the law. Here no change in the law had occurred in the interim.

This Court in *Freeman v. Smith*, 62 F.2d 291, held that the decision previously rendered is the law of the case on the second appeal.

In *Rogers v. Hill*, 289 U.S. 582, 592, the U. S. Supreme Court held that a decree of the appellate court from an order of the lower court granting a temporary injunction was not final. An interlocutory

order was involved there. Here, the order of sale of April 25, 1952 (PR 50), was final.

Wells Fargo & Company v. Taylor, 254 U.S. 175-189, is based entirely upon insufficiency of the pleadings, and necessarily upon reversal the lower court in its discretion could allow an amendment to the bill of complaint.

Hodge et al. v. Muscatine County, et al., 196 U.S. 276, involved a cigarette sales tax. It has little if any more pertinency here than for a customer of a merchant in San Francisco or Seattle to urge that he could not be required to pay a sales tax on the merchandise he buys because he has no notice of the imposition of the tax, despite the law or the ordinance that imposes it.

The U. S. Supreme Court in *Messenger v. Anderson*, 225 U.S. 436, held that a prior decision of a Federal circuit court of appeals is not the law of the case for the Supreme Court when reviewing a later decision of the former court in the same case. The logic thereof is plain; otherwise, nothing could be accomplished by taking an appeal if the lower Appellate Court's decision bound the Supreme Court, any more than to take an appeal from the trial court if its decision was the law of the case when heard by this Honorable Court.

In *Chase v. U. S.*, 256 U.S. 1, 9, the Circuit Court of Appeals remanded the case on the first appeal "with instructions to permit the defendant to answer, if so advised". This Court's opinion of July 8,

1953 (206 F.2d 612), and mandate of August 19, 1953, gave no such instruction.

In *Mutual Life Insurance Co. v. Hill*, 193 U.S. 551, 553, the decision on the first appeal was based upon the averments of the pleadings—not upon the merits.

APPELLEE'S FIRST POINT (Bf. 7-19).

Appellee's argument (Bf. 7-19), purportedly replying to Appellants' Fifth Proposition (Appellants' Main Bf. 45-58), entirely ignores that this is a Special Statutory Proceedings as well as Appellants' Second Proposition (Main Bf. 18-26), Appellants' Third Proposition (Main Bf. 27-36), and Appellants' Fourth Proposition (Main Bf. 36-45), and makes no attempt to answer those Propositions or Appellants' argument therein advanced.

Admittedly neither the statutory nor the municipal requirements were complied with in the submission or preparation of Appellee's purported Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370). (See Appellants' Main Bf. 18-26.)

Appellee has not denied Appellants' charge (Main Bf. 37-38), that the document (PR 347), introduced through witness Henry's deposition (PR 345-346) was not new or newly discovered evidence, but was in Appellee's possession at the first trial on January 18, 1952.

Appellants challenge Appellee's version of what constitutes a delinquent tax roll (Appellee's Bf. 17-18), or that the Alaska practice is such as Appellee

asserts. Sec. 16-1-122, ACLA 1949, (Appellants' Main Bf. #13,455, pp. 7-9), specifies how a delinquent tax roll shall be made up, what it shall contain, and how it shall be noticed, and Sec. 16-1-123, *ibid*, how it shall be presented (Appellants' Main Bf. #13,455, pp. 9-10).

Appellants challenge Appellee's contention that they made no objection to the sufficiency of the application (Appellee's Bf. 18). Appellants specifically urged that no proof of either publishing or posting any notice of application for an order of sale on the purported amended supplemental tax roll had been made, and that no statute authorized its presentation upon an application made more than 3 years previously (PR 381).

The fact is no written application was ever presented except that of January 3, 1951 (PR 1-2), to which Appellants made numerous objections (PR 15-22; 22-23; 26-28).

Neither Sec. 16-1-122 nor 16-1-123, *supra*, in any wise indicate that the application is a complaint, but both contain specific requirements for the notice of application. No notice of any kind was published, or even posted, of application for order of sale under the purported Amended Supplemental Delinquent Tax Roll (PR 369-370) other than service of a copy of that document upon Appellants the day before it was presented to the Court.

Sec. 16-1-124, ACLA 1949 (Appellee's Bf. 18-19) provides for the protection of a taxpayer's substantial rights.

Appellants submit that their substantial rights were affected by the Appellee's irregularities and failure to comply with the statutory and ordinance requirements (Appellants' Main Bf. 22-26), to which Appellee has made no Reply.

APPELLEE'S SECOND POINT (Bf. 19-22).

Appellants submit that Appellee makes no adequate answer to either the law or the facts stated in Appellants' First Proposition in their Main Bf. (p. 14-18). The date "June 12, 1953", in line 6 from bottom p. 14, thereof, should have been "June 12, 1954"; but, Appellee evidently was not confused thereby.

Appellants submit that the language of their main brief (pp. 14-18) is clear, and not only shows the noncompliance of the pretended Amended Supplemental Delinquent Tax Roll for 1949 (PR 369-370) with statutory and ordinance requirements, but also its service upon Appellants on June 23, 1954, the day before the trial on June 24, 1954, and that Appellants had no time to obtain evidence to meet it, and would have been unable to prove even the nonperformance of the jurisdictional requirements, as stated in their Objections (PR 380-381) in support of their Motion to strike it (PR 379-380), except for Appellee's Admission (PR 350c), other than those shown on the face of the document itself.

APPELLEE'S THIRD POINT (Bf. 22-26).

Appellee admits Appellants' contention (Main Bf. 21, also, 22-26), that no assessment was made for 1949 by the city assessor. Appellee admits (Bf. 23), "This was done by the Board of Equalization simply by copying the work of the previous year of the assessor;" which was jurisdictional. (Appellants' Main Bf. 18-26.)

While Appellants took that same position on the first appeal (Appellants' Main Bf. #13,455, p. 42-44), there was no such admission by Appellee then before either the trial or this Court. See also Appellants' Main Bf. pp. 82-85, #13,455.

Appellee apparently concedes Appellants' contention that this Honorable Court's opinion of July 8, 1953 (206 F.2d 612) is the law of the case, but erroneously applies it to claim that the document (PR 347), which was not new or newly discovered evidence, was thereby made admissible.

APPELLEE'S FOURTH POINT (Bf. 26-28).

Appellants submit that Appellee's Fourth Point does not meet their Third Proposition (Main Bf. 27-37), and that not only the doctrine of exhaustion of administrative remedies does not apply, but that even if it did Appellee waived it by not advancing it at the first trial (Appellants' Main Bf. 35-36). Furthermore, Appellee has admitted the 1949 assessment was not made by the city assessor (Appellee's Bf. p. 23).

Appellee advances the illogical suggestion that, "if the Appellants saw fit to commence to participate in this procedure thus confessing they had adequate notice, but rely solely upon alleged technical objections, they waived their hearings on the merits" (Appellee's Bf. 23). In other words, if Appellants resist the overassessment and overvaluation made in bad faith without equalization, they then are bound no matter that Appellee ignored performance of all statutory and ordinance requirements. If they didn't resist, they, of course, then would be in default. Clearly, Appellee takes the position that Appellants have no rights whatever which they can lawfully seek to protect.

Appellants' objections are not technical. They are statutory. (Sec. 16-1-124, ACLA 1949 (Appellants' Main Bf. #13,455, p. 11) provides that objections may be made on the ground of overassessment, overvaluation, bad faith, and nonequalization.

APPELLEE'S FIFTH POINT (Bf. 28-29).

Appellants submit there is no evidence of the city assessor having made an assessment for the tax year 1949, and that the appellee has admitted that it was done simply by the Board of Equalization copying the work of the previous year of the assessor (Appellee's Bf. 23), and that the document (PR 347) itself clearly shows that no assessment was made by the city assessor (Appellants' Main Bf. 40), and that such facts show bad faith.

APPELLEE'S SIXTH POINT (Bf. 29-30).

Appellants submit that Appellee's Sixth Point neither refutes the law nor the facts stated in Appellants' Sixth Proposition (Main Bf. 59-67).

Wherefore Appellants renew their prayer that the Order of Sale of June 25, 1954 (PR 388-389) may be vacated and set aside and the Appellee's Application dismissed.

Dated, Juneau, Alaska,
April 23, 1955.

Respectfully submitted,
R. E. ROBERTSON,
ROBERTSON, MONAGLE & EASTAUGH,
Attorneys for Appellants.

No. 14,563

IN THE

United States Court of Appeals
For the Ninth Circuit

WONG BING NUNG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

GUS C. RINGOLE,

709 Central Tower, San Francisco 3, California,

Attorney for Appellant.

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IN THE

**United States Court of Appeals
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Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

STATEMENT OF JURISDICTION.

The indictment filed January 6, 1954 in the United States District Court for the Northern District of California, Southern Division charged a violation of 18 U.S.C.A., Section 545, smuggling, committed within the jurisdiction of this Court. (T. 2.) Trial was by the Court, a jury being waived. (T. 5.) Motion to acquit was denied July 1, 1954. (T. 8.) Defendant was sentenced September 14, 1954 to one year in the County Jail, which sentence was suspended, probation granted for two years and he was fined \$250.00. (T. 14.) Notice of appeal was filed September 15, 1954. (T. 15.) The appeal was timely (Rule 37(a) Rules of Criminal Procedure). Ju-

risdiction of this Court to review the final judgment of the District Court is sustained by 28 U.S.C.A., Sections 1291, 1294.

STATEMENT OF THE CASE.

Title 18 U.S.C.A., Section 545 provides:

“Whoever knowingly and wilfully with intent to defraud the United States smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced . . . shall be fined not more than \$5,000 or imprisoned not more than two years or both.”

The indictment charged:

“That Wong Bing Nung on or about the 15th day of December, 1953, at the City and County of San Francisco, State and Northern District of California, did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States, merchandise which should have been invoiced, to-wit, 6 boxes containing an assortment of pills, capsules, syrups, powders, cigarettes, ointments, poultices, oils and foodstuffs.”

The facts are simple. Defendant had been a seaman on board the SS President Cleveland for two years. (Rep. Tr. 79.) The ship docked in San Francisco December 15, 1953.

The witness Dong Dock Leong was in the habit of doing favors for the crew because Dong knew English, could read and write it and others includ-

ing defendant, could not. (Rep. Tr. 80.) At the request of defendant, Dong wrote a declaration for certain merchandise described therein. (Exhibit No. 7, Rep. Tr. 48, 73.)

The merchandise described in the declaration was, after duty paid, taken ashore that day.

On the morning of the next day, the 16th, defendant signed on as a crew member for the return trip to China. (Rep. Tr. 82, 83.) He was arrested that night. (Rep. Tr. 7.)

Exhibit I in evidence is six cartons or boxes of merchandise (Rep. Tr. 12) containing the merchandise (Rep. Tr. 16) described in the indictment. This merchandise was seized on the vessel in defendant's room by Customs officials, two boxes being in an adjoining room. (Rep. Tr. 11.)

Defendant asked witness Dong to ascertain from the Customs agents if he, defendant, could land that merchandise. (Rep. Tr. 76, 77, 82.) Dong asked Marshall, a customs man and he told Dong it could not be done. Dong said that if defendant could not land the goods he would take them back to Manila. (Rep. Tr. 76, 77, 82.) There was no attempt at bribery or wrong doing. (Rep. Tr. 77, 78.)

The Customs officials were advised of the presence of the merchandise on board ship and actually saw it. The merchandise was examined by Kahler, Customs agent of San Francisco and Blonder, his assistant, in defendant's room on board ship. Marshall, the other agent was told the merchandise was in

Wong Bing Nung's room. None of it was concealed. (Rep. Tr. 84, 85.)

The merchandise was admittedly owned by defendant and in his possession on board ship. Kahler admitted that while in his testimony he stated that defendant tried to get Dong to "fix" Marshall, that the word "fix" did not carry the connotation of something crooked. (Rep. Tr. 65.)

Much testimony was introduced about merchandise found in an automobile belonging to defendant. Implications of guilt were sought to be drawn from this testimony (Rep. Tr. 33, 40 to 44, 48, line 12 to 53, 60, 61) particularly in view of the way the merchandise was found under the sweaters. (Rep. Tr. 107, lines 1 to 4; 108, line 1.) While we believe it was gross error to admit this testimony such error was as far as the United States Attorney could do so, cured to a degree. (Rep. Tr. 50, line 18 to 52, line 9.)

Further the United States Attorney stated. (Rep. Tr. 109, line 23 to 110, line 5.)

"Mr. Riordan. The Government at this time makes no claim that the United States Exhibit No. 2 is within the terms of the indictment, what was found in his car, we have no claim to.

Our only claim is that United States Exhibit No. 1 was not declared and that is where the gravamen of the offense lies. Nothing whatsoever to do with No. 2.

We only used that as circumstantial evidence, that some of it was taken off, the other was not declared."

The defendant knows little English. (Rep. Tr. 90.)

Testimony of witness Kahler:

“Mr. Ringole. Q. You knew that this man didn’t talk very good English?

A. He speaks enough.

* * * * *

Q. No, he talks very little English, isn’t that true?

* * * * *

A. He holds an automobile driver’s license, he has got a car registered to him.

* * * * *

Q. . . . But you know he doesn’t speak fluent English.

A. He spoke English to me.

Q. Yes, surely he did. You know he didn’t speak fluently?

A. I don’t know.

Q. Well, let us be fair about it.

A. I don’t know.

Q. Oh, Mr. Kahler, let’s be fair. You know that he doesn’t speak fluent English.

A. He answered my questions in English, if I can put it that way.

* * * * *

The Court. How long did you question him?

The Witness. Just briefly, your Honor, because he kept saying continuously, ‘No savvy, no savvy,’ which is common among these people.

* * * * *

Mr. Riordan. Q. What do the words ‘No savvy’ mean?

A. Well, it is pidgin English; I don’t know.”

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in denying appellant's motion to acquit. (Trans of Rec. Vol. I, 8.)
2. The District Court erred in finding the defendant guilty of the crime charged in the indictment. (Trans of Rec. Vol. I, 2.)
3. The District Court erred in finding that defendant intended to defraud the Government of the United States by moving the property into this country without the payment of customs duty as required by law.
4. The District Court erred in finding that defendant sought to move the property by clandestine means into the United States.
5. The District Court erred in finding that the intention of the defendant and his conduct constituted a violation of 18 U.S.C.A., Section 545.
6. The District Court erred in finding defendant guilty and in denying defendant's motion for judgment of acquittal.

ARGUMENT.

1. **THE JUDGMENT SHOULD BE REVERSED BECAUSE CLANDESTINE IMPORTATION CONCERNING WHICH THERE IS NO EVIDENCE, IS OF THE VERY MARROW OF THE OFFENSE.**

United States v. Thomas, 28 Fed. Cas. 76 No. 16473, 4 Ben. 370;

United States v. Keck, 172 U.S. 434, 43 L.Ed. 505;

United States v. Ritterman, 273 U.S. 261, 71 L.Ed. 636;

United States v. McGill, 28 Fed. 2d 572 (Ninth Circuit);

United States v. One Pearl Chain, 139 Fed. 513;

The Przemyśl, 23 Fed. 2d 336.

The case was tried on the first paragraph of 18 U.S.C.A., Section 545 (Rep. Tr. 36) the indictment being laid under that paragraph. Despite a great deal of the testimony importation "contrary to law" denounced in the second paragraph of the section is not for consideration. See *Keck* supra, page 437 where the first count under a like statute was dismissed for insufficiency. Here, defendant was not charged at all. (Rep. Tr. 109, line 23, 110.) Exhibit I described in the indictment consisting of six boxes or cartons was at all times in the defendant's room and a room adjacent, in full view of five other crew members who lived there. Nothing was hidden. Customs officials were not only advised of its presence but actually saw and examined the merchandise involved. Full and complete disclosure was made to Customs. (Rep. Tr. 11.)

Witness Dong at the instance of defendant made the utterly foolish request of the Customs officials that he be permitted to land this merchandise. Admittedly there was no wrong doing in the request. (Rep. Tr. 65, 77, 78.) The Customs officials seized the merchandise on the ship itself just as in *Keck* supra, the diamonds were seized by Customs on the ship itself, as in *One Pearl Chain* supra, the chain was seized upon the ship and in all these cases

brought through the Customs lines by Customs officials themselves. Everything done by defendant with reference to the merchandise was open and above board. Everything done negatives smuggling and clandestine introduction. The case is stronger for defendant than any of the cases cited. In *Keck* there was plot and concealment; *Ritterman*, untruths and concealment. There was not the slightest concealment or misrepresentation by defendant. He did not deny ownership. (Rep. Tr. 88.) How could he? He had already sent Dong to see Marshall. Kahler's testimony above quoted practically admits that defendant did not know enough English intelligently to answer him. Despite broad experience with Chinese, only Kahler did not know that "no savvy" means "I do not understand you"!

Thomas supra, considered an earlier statute of like import as Section 545. The Court states that the statute

"makes the clandestine introduction or smuggling into the United States of dutiable goods in cases therein provided for, a criminal offense which is complete as soon as the goods are so clandestinely introduced or smuggled into the United States; but in such cases it is the secret and clandestine manner of the importation with the intent to defraud the revenue and not the non-payment of . . . the duties prior to the importation which constitutes the gist of the offense."

Keck, holds that there is no such crime as an attempt to smuggle. (Page 509.) Of the statute it says that,

“Whilst it embraces the act of smuggling or clandestine introduction, it does not include mere attempts to commit the same. Nothing in the statute by the remotest possible implication can be found to cover mere attempts to commit the offense.” . . .

(Page 510) :

. . . ‘it follows that mere acts of concealment of merchandise on entering the waters of the United States however preparatory that may be and however cogently that may indicate an intention of thereafter smuggling or clandestinely introducing, at best are but steps or attempts not alone in themselves constituting smuggling or clandestine introduction. Quoting Russel on Crimes the Court said

“smuggling consists in bringing on shore or carrying from the shore, goods, wares or merchandise for which the duty has not been paid.’

Quoting from Bacon it states,

‘As the offense of smuggling is not complete unless some goods, wares or merchandise are actually brought on shore . . . a person may be guilty of divers practices, which have a direct tendency thereto, without being guilty of any offense.’ ”

Referring to English statutes the Court said (page 510) :

“that the word ‘smuggling’ and ‘clandestine introduction’ so far at least as respected the introduction of dutiable goods from without the Kingdom, signified the bringing of the goods on land, without authority of law, in order to evade the pay-

ment of duty, thus illegally crossing the line of the Customs authorities.”

In *One Pearl Chain*, pages 516-517 the Court states:

“but how can she be said to have ‘clandestinely’ introduced it when, before bringing it ashore she gave to the Customs officials a written declaration, which in effect said to them, ‘I have in my baggage and on my person wearing apparel (including jewelry) which I have purchased abroad.’ ”

Paraphrasing that statement defendant stated to the Customs officials, “I have in my room six boxes of merchandise which I purchased abroad.” Wherein is the clandestine introduction?

Reference is made to *McGill* supra, a decision of this circuit quoting with approval *Keck* and *Ritterman* and holding that the mere importation of liquor within the three mile limit was not smuggling.

2. THE JUDGMENT SHOULD BE REVERSED BECAUSE THERE WAS NOT THE SLIGHTEST INTENT TO DEFRAUD THE UNITED STATES.

The statute specifically provides that the smuggling must be “with intent to defraud the United States.” (18 U.S.C.A., Section 545.) The statute interprets itself.

United States v. Kushner, 135 Fed. 2d 668.

(Page 671):

“The question is not free from doubt but we incline to the view that intent to deprive the

government of revenue must be held to be an ingredient of the crime defined in Section 1593A."

The statute there required an intent to defraud the *revenue* of the United States.

The Przemysl, 23 Fed. 2d 336. At page 340 the Court said:

"These same authorities recognize that the terms 'smuggling' or the 'importation of and the introduction of foreign goods' into the country, must be considered with reference to the place at which, the circumstances under which, and the intention with which, the goods were found at the time of seizure; *the general test being whether or not there is an intent to defraud the revenue.*" (Italics supplied.)

Here there was not only no intent to defraud the government but the express intent of defendant was not to land the goods here if his foolish request was refused, but to take them back to Manila.

3. THE JUDGMENT SHOULD BE REVERSED BECAUSE DEFENDANT VIOLATED NO DUTY TO THE UNITED STATES.

Defendant is a seaman or crew member. On the morning of December 16, 1953 the day after the SS President Cleveland arrived in San Francisco he signed on for the return trip to China. Being unable to land his merchandise without payment of duty he decided to take it back to Manila. He declared part of the things he had purchased abroad, paid the duty and took them off the ship. He left all of

Exhibit I in his room. Witness Dong told Customs officials that if defendant could not land the merchandise as requested, he would take the merchandise back to Manila. This he had a perfect right to do. He had up to that period not imported the merchandise.

Title 19, Section 8.1, Code of Federal Regulations, page 158, provides:

“Liability of Importer for Duties. Unless otherwise specially provided for by law, duties accrue upon imported merchandise on arrival of the importing vessel within a customs port *with intent then and there to unlade . . .*” (Italics supplied.)

Exhibit I constituted herbs, vitamins, dried meats and liquors. They were merchandise and not baggage and defendant to that extent was an importer. He was not liable for payment of duties because he did not have the intent *then and there to unlade* since he only intended to unlade if his foolish proposition was accepted. In any event there is no evidence that he intended to unlade in San Francisco. He was not under any duty whatever to declare them.

Title 19, Section 23.4, page 431 CFR, provides inter alia:

“(b) Articles taken ashore by an officer or seaman permanently leaving his vessel without intention to re-ship shall be cleared through customs on the vessel or at the customs office on the pier and any duty found due shall be collected as in the case of an arriving passenger. (See Section 10.22 of this chapter.)”

Title 19, Section 10.22 page 219 CFR is by its terms wholly inapplicable to a seaman who re-ships and provides that the declaration by a crew member shall be made (Form 5123).

“(b) at the port where the officer or crew member intends to land the articles.”

Defendant had re-shipped. He was not permanently leaving the ship. The regulations are not applicable to him.

On the matter of the manifest it is provided (Title 19, Section 4.8, page 94 CFR):

“(e.) All articles on board the vessel acquired by officers and members of the crew, . . . shall be specified in the *list of sea stores* in the following form: (Italics supplied) Upon delivery to customs of this list of articles acquired abroad by officers and members of the crew, the master of the vessel shall have shown thereon opposite the name of each officer and crew member *who intends to land articles at that port* for which written declaration and entry are required . . .” (Italics supplied.)

Thus it appears first, that it is not the duty of defendant to place anything upon the manifest, second that it is the duty of the master to list the purchases upon the “List of Sea Stores” and, third that this is only necessary in cases where the crew member intends to land articles at the port. The evidence is silent as to the intention of this defendant to land merchandise here. On the contrary the evidence shows that he intended not to land it here.

Under these regulations and because he had re-shipped on the same vessel, he is in the position of a passenger going from Hong Kong to his home in London by way of San Francisco who carries with him merchandise purchased in Hong Kong. He arrives in San Francisco, he declares some articles, pays duty, and gives them to friends here. He returns to the ship and proceeds to London. Is he smuggling? Are the Customs officials authorized to seize the merchandise in his room? There is not a single regulation directed to the crew member who re-ships, as far as research of this counsel discloses. The above quoted regulations refer to crew members who do not re-ship. The defendant therefore was perfectly at liberty to take his goods back to Manila or to any other port where the ship stops, without interference from Customs. There is no regulation that counsel can find that compels him to make declaration, pay duty or unlade in San Francisco.

All concerned at the trial including this counsel were technically mistaken when they stated that Exhibit I was not in the manifest but was in the "Crew's Purchase List". (TR 45, 46.) The above quoted regulation establishes a "List of Sea Stores" not a "Crew Purchase List". The regulation further makes the "List of Sea Stores" a part of the manifest. The oath of the master therefore on the "Preliminary Entry of Vessel" correctly refers to all attached documents as the "manifest".

On page 87 thereof there is listed four cartons of cigarettes a part of Exhibit I and described in the

indictment, the balance of the exhibit being omitted unquestionably by someone's error. However the errors are all inconsequential for whether "Manifested" or "Invoiced" or not, the goods could have been the subject of smuggling.

CONCLUSION.

It will be noted that Customs officials took everything this man had and for the time being pauperized him. (Vol. 1, TR pages 12, 16.)

Pity it is that when they realized how ignorant he is after he had made his extraordinary suggestion that they did not explain to him his rights and advise him what he should or could do. Possibly they felt that an arrest for an asserted violation of law is more in the public interest than education to avoid violation. Possibly this is another example of "man's inhumanity to man". Possibly the spirit of the arrest is found in the phrase, "He hasn't a Chinaman's chance."

We submit the judgment should be reversed.

Dated, San Francisco, California,
November 24, 1954.

Respectfully submitted,

GUS C. RINGOLE,

Attorney for Appellant.

No. 14,563

IN THE

United States Court of Appeals
For the Ninth Circuit

WONG BING NUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

JOHN H. RIORDAN, JR.,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

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**PAUL P. O'BRIEN,
CLERK**

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No. 14,563

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG BING NUNG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction of the United States District Court for the Northern District of California, convicting the appellant, after trial by Court, of violation of the smuggling statute (18 U.S.C. 545).

The jurisdiction of this Honorable Court is properly invoked under the provisions of 28 U.S.C.A., Sections 1291 and 1294.

STATEMENT OF THE CASE.

Title 18 U.S.C.A., Section 545 provides:

“Whoever knowingly and wilfully with intent to defraud the United States smuggles or clandes-

tinely introduces in the United States any merchandise which should have been invoiced * * * shall be fined not more than \$5,000 or imprisoned not more than two years or both."

The indictment charges:

"That Wong Bing Nung on or about the 15th day of December, 1953, at the City and County of San Francisco, State and Northern District of California, did knowingly and wilfully, with intent to defraud the United States, smuggle and clandestinely introduce into the United States, merchandise which should have been invoiced, to-wit, 6 boxes containing an assortment of pills, capsules, syrups, powders, cigarettes, ointments, poultices, oils and foodstuffs."

Appellant waived a jury trial (Vol. I, Tr. 5) and, after trial by Court in this matter, he was adjudged guilty of the charge contained in the indictment. The trial judge imposed a 1 year suspended sentence and a fine of \$250, and placed appellant on probation for a period of 2 years.

Appellant stated in his opening brief that the "facts are simple" and, correctly so, because he has stipulated to almost the government's entire case (Tr. 6, 10, 11, 13 and 48).¹

At the time of the crime set forth in the indictment appellant was a member of the crew of the S.S. PRESIDENT CLEVELAND and was such a crew

¹All references hereafter to testimony and exhibits are found in Volume II of the Reporter's Transcript and designated by the letters "Tr."

member of said vessel for a period of two years prior thereto (Tr. 79). On December 15, 1953, the PRESIDENT CLEVELAND docked in San Francisco, having completed a voyage from Hong Kong (U.S. Exhibit No. 6 Ship's Manifest, Tr. 45).

Pursuant to Customs regulations, every crew member is required to submit a declaration of all goods and merchandise purchased by him in a foreign country. In accordance with such regulations, appellant submitted such a declaration (U.S. Ex. 7, Tr. 45 and 48).

Appellant's only witness, Dong Dock Leong, testified that he wrote the declaration for appellant at appellant's request (Tr. 73). Appellant signed the declaration (Tr. 80). Appellant told the witness Dong exactly what to declare (Tr. 81, 87). In fact, the witness asked appellant if he had anything additional to declare, and appellant said no (Tr. 87). This witness testified that none of the merchandise seized was ever declared (Tr. 86).

For the purpose of appraising the declared merchandise, Customs Inspector Forsyth testified about questioning appellant on December 15, 1953 in connection with his declaration, and appellant steadfastly denied that he had no other imported merchandise to declare (Tr. 57, 58).

Dong, appellant's only witness, further testified that on December 16, 1953, at about 6:30 P.M., appellant requested him to contact Customs Inspector Marshall and ascertain if appellant could remove or unload certain undeclared merchandise (U.S. Ex.

No. 1) off the ship and through the Customs line (Tr. 76, 77).

On December 16, 1953, the day after the ship docked, between 9 and 10 P.M. the Customs Inspectors seized six cartons or boxes weighing between 500 and 600 pounds (Tr. 6) containing the merchandise set forth in the indictment (U.S. Exs. 1, 3; Tr. 11, 12). This merchandise was seized on the vessel in the appellant's room, two boxes in an adjoining room. After the seizure appellant was questioned by Customs Agent Kahler and appellant denied that he was the owner of the seized merchandise (Tr. 88). However, it was stipulated in the trial that appellant was in fact the owner (Tr. 11) and that said merchandise was not declared (Tr. 48).

The merchandise that appellant did declare in United States Exhibit 7 was found after the seizure in appellant's automobile which was parked at the dock near the ship. This declared merchandise was similar to the undeclared merchandise seized on the ship (Tr. 40, 60, 61).

A day after above seizure the Customs Agents found in appellant's automobile several sheets of paper (U.S. Ex. 3; Tr. 25, 53) containing Chinese writing or characters. These documents were described by a witness as constituting an invoice of various medicinal preparations, together with the price, amount, quantity and the names of various business establishments. These business establishments are all located in San Francisco (Tr. 21, 22). The witness further testified that about 50% of the items men-

tioned in the invoice were contained in the seized merchandise (Tr. 25). At the same time the Agents also found in appellant's automobile two brown note books (U.S. Exs. 4, 5; Tr. 29, 31, 54). The witness described United States Exhibit 4 as containing a price list of various articles and that some of the articles therein mentioned are the same as those seized (U.S. Ex. 1; Tr. 30).

United States Exhibit 5 was described as containing a list of articles, their unit price and the total value. There is also testimony that some of the articles listed in this exhibit are also included in the seizure (U.S. Ex. 1; Tr. 31).

ARGUMENT.

I. APPELLANT INTENDED TO DEFRAUD THE UNITED STATES IN THAT HE FAILED TO MAKE A FULL AND COMPLETE CUSTOMS DECLARATION AND BY CLANDESTINELY BRINGING IMPORTED MERCHANDISE INTO THE COUNTRY.

The appellant's first contention is that he never intended to bring the merchandise into the United States. The authorities hold that goods are imported or brought into the United States when they enter the waters of the United States. In *Tomplain v. United States*, 42 F. 2d 203, certiorari denied 282 U.S. 886, the Court said on page 205:

“* * * the offense of unlawful importation was complete, in the absence of a bona fide intent to make entry and pay duties, when the prohibited merchandise entered the waters of the United States, although not actually landed on shore.”

The Court further stated on page 204:

“Entry through a custom house is not of the essence of the act.”

The doctrine expressed in *United States v. Keck* and *United States v. Ritterman*, cited in appellant's brief, were distinguished in the *Tomplain* case.

The Supreme Court held in *United States v. Keck*, 172 U.S. 434, that the crime of smuggling is completed when the obligation to pay duty arose. Under the circumstances presented by the record on this appeal, the obligation to pay customs duty arose when appellant filed his declaration (U.S. Ex. 7). Appellant, therefore, defrauded the government when he failed to make a full and complete disclosure in his declaration. At the bottom of U. S. Exhibit 7 appears the following language:

“I declare that the above statement, is a just, true, and complete account of all articles brought into the United States by me which have been acquired abroad.”

There is an abundance of evidence to support the finding of the above appellant's felonious intentions to bring the merchandise into the United States. The record shows that he filed a declaration containing merchandise identical with that seized by the customs officials which was not declared. His friend, Dong, asked the appellant if he made a complete declaration (Tr. 87). Subsequently, even the customs officials presented him with another opportunity to make a complete disclosure (Tr. 57, 58). The record shows that appellant never intended to declare the

merchandise set forth in the indictment because when it was seized, he denied the ownership thereof (Tr. 88). The record indicates that the motive for appellant's clandestine introduction of the goods into the United States was for sale and delivery to stores in the San Francisco area and thus defraud the government of customs duty. This is indicated by the Chinese invoices and documents found in his automobile.

II. APPELLANT FAILED TO EXPLAIN HIS POSSESSION OF THE MERCHANDISE SET FORTH IN THE INDICTMENT.

It was stipulated at the trial that appellant was in fact the owner (Tr. 11) and that the said merchandise was not declared (Tr. 48). In view of this we encompass the rule of law which states that possession of goods on which customs duty was not paid is sufficient to authorize a conviction for violating customs laws; unless the defendant can explain the possession to the jury's satisfaction.

Title 18 *United States Code*, Section 545:

"Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section."

Tomplain v. United States, 282 U.S. 886;

Hounes v. United States, 268 U.S. 695;

United States v. Stein, 53 F. Supp. 911.

Appellant never took the stand to explain his admitted possession. As stated by his attorney (Tr. 72):

“Mr. Ringole. I have decided, in view of this testimony, that it won’t be necessary to put the defendant on the stand, won’t, can’t help anything in the case.”

Appellant’s counsel, in his brief, makes the contention, which is not supported by the record, that it was not the defendant’s intention to defraud the United States by smuggling or clandestinely introducing the merchandise into the United States but, on the other hand, it was the defendant’s intention that if he could not move the merchandise through Customs without a declaration, he was going to return the same to Manila. The defendant did not at any time inform the Customs officials that this was his intention (Tr. 71). In fact, the only statements made by the appellant to the Customs officials were to the effect that the merchandise (U.S. Ex. 1) did not belong to him (Tr. 88), and it was not until the time of trial that ownership of the merchandise was admitted by him.

III. THE EVIDENCE SUPPORTS THE FINDINGS AND JUDGMENT MADE BY THE TRIAL JUDGE.

Findings by the trial Court have the force and effect of a verdict and are governed by the same principles concerning appellate review. So, where the case is tried by the Court, the rules as to review are the same as though there had been a jury verdict. *Furrow v. United States*, 46 F. 2d 647; 24 C.J.S., page 806.

It is the accepted rule that the verdict of the jury must be sustained if there is substantial evidence,

taking the view most favorable to the government to support it. *Glasser v. United States*, 315 U.S. 60, 80. In *Craig v. United States*, 81 F. 2d 816, 827, certiorari denied, 298 U.S. 637, this Honorable Court said:

“* * * To sustain a conviction, we need not be convinced *beyond reasonable doubt* that the defendant is guilty: It is sufficient if there is in the record substantial evidence to sustain the verdict.

In *Felder v. United States* (C.C.A. 2), 9 F.2d 872, 875, certiorari denied, 270 U.S. 648, 46 S.Ct. 348, 70 L.Ed. 779, the court said:

‘That we cannot investigate it (the testimony) to pass on the weight of the evidence is a point too often decided to need citation; nor can we, after investigation, use such doubts as may assail us to disturb the verdict of the jury. *That reasonable doubt which often prevents conviction must be the jury’s doubt, and not that of any court, either original or appellate.* (Cases cited.) Our duty is but to declare whether the jury had the right to pass on what evidence there was.’ (Italics our own.)

The correct rule was thus tersely phrased in *Humes v. United States*, 170 U.S. 210, 212, 213, 18 S.Ct. 602, 603, 42 L. Ed. 1011:

‘The alleged fact that the verdict was against the weight of evidence we are precluded from considering, if there was any evidence proper to go to the jury in support of the verdict. (Cases cited.)’

See, also, 17 C.J. 264-269.”

At the conclusion of the trial appellant made a motion for judgment of acquittal. In denying this motion, the trial judge filed a written memorandum (Vol. I, Tr. 8) wherein he stated:

“The Court finds that defendant owned the property specified in the Indictment; that he retained possession of such property on board the SS President Cleveland when it docked in San Francisco, that he failed to list such property on the ship’s manifest, that he failed to declare such property in his customs declaration, that he intended to defraud the government of the United States by moving the property into this country without the payment of customs duties as required by law, that he sought through an intermediary to move the property by clandestine means into the United States, that his intent and conduct constituted a violation of 18 U.S.C.A. 545.”

CONCLUSION.

Appellant’s brief concludes in a theme of alleged racial discrimination wherein he states “I haven’t a Chinaman’s chance.” Nowhere does he substantiate this by reference to the record because the trial and judgment are absolutely void of any such suggestion. Note that after conviction the Honorable trial judge did not sentence the appellant to imprisonment but was magnanimous enough to grant appellant probation and a small fine of \$250 (Vol. I, Tr. 17). Where in the said judgment can the appellant claim prejudicial misconduct? The record further shows that the appellant availed himself of the prerogative not

to take the witness stand in his own defense. Thus, there is no evidence or explanation in defense of his clandestine activities.

In the light of the foregoing, and on a record free from error, appellee respectfully urges this Honorable Court to sustain the judgment of the trial judge. This judgment was clearly supported by substantial evidence, and the trial was conducted in conformity with the highest traditions of our federal judicial system, during all stages of the proceedings, and appellant was accorded every right to which he was entitled, while at the same time the trial judge safeguarded all of the rights of the appellee herein, United States of America, in the exercise of its sovereignty.

It is, therefore, respectfully submitted that the appellant's conviction should be affirmed.

Dated, San Francisco, California,

December 29, 1954.

LLOYD H. BURKE,

United States Attorney,

JOHN H. RIORDAN, JR.,

Assistant United States Attorney,

Attorneys for Appellee.

No. 14,563

IN THE

United States Court of Appeals

For the Ninth Circuit

WONG BING NUNG,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

G. C. RINGOLE,

709 Central Tower, San Francisco 3, California,

Attorney for Appellant.

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PAUL P. O'BRIEN,
CLERK

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No. 14,563

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WONG BING NUNG,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF OF APPELLANT.

ARGUMENT.

**1. THE TOMPLAIN CASE IS WHOLLY BESIDE
THE POINT AT ISSUE.**

The Acts whence Section 545, 18 U.S.C.A. is derived are Section 593(a) (Smuggling) and Section 593(b) (Importation and bringing into the United States certain merchandise contrary to law) Tariff Act of 1922. These sections became Section 1593, 19 U.S.C.A., repealed June 25, 1948 (1953 Cumulative Part Page 205, Title 19 U.S.C.A.) and became Section 545, 18 U.S.C.A. in two sentences, separated by the word "or".

Gillespie v. U. S., 13 Fed. 2d 736, 737.

The statute in the second sentence charges an altogether different offense from that defined in the first sentence.

Briefs on both sides are in agreement that the indictment is laid under the first sentence of Section 545, namely, Smuggling and the record is very clear on this point. (Rep. Tr. 35, 36.) On page 35, line 4 the following occurred:

“The Court. Now, counsel, would you state, in the light of the issues, the particular section under which you are proceeding?

Mr. Riordan. Yes, your Honor. The indictment, your Honor, is couched in the terms of the first sentence of the statute.”

U. S. v. Keck, 172 U.S. 434, 43 L.Ed. 505; Appellant's Opening Brief page 7.

In the *Tomplain* case the violation was laid under Section 593(b), Tariff Act of 1922. The indictment alleged an unlawful importation or bringing into the United States contrary to law of certain merchandise.

The charge was not brought under Section 593(a) namely, Smuggling, now the first sentence of Section 545, 18 U.S.C.A., the predicate of this prosecution.

The *Tomplain* case cites *Cunard v. Mellon*, 262 U.S. 100, 67 L.Ed. 894 and quotes from that case,

“Entry through a custom house is not of the essence of the act.”

It deals with the impact of Prohibition Laws upon the importation of liquor. Nothing in the case is referable to smuggling.

In the *Gillespie* case supra, the illicit liquor was actually landed in a lumber yard. The charge was laid under Section 593(b). The Court said (page 737):

“The statute relied upon, and above quoted, does not speak of smuggling; the statutory words in section 593(b) are to ‘bring into the United States.’ (Emphasis supplied by the Court.)

“It is in section 593(a) that punishment is prescribed for one who ‘smuggles or clandestinely introduces into the United States any merchandise which should have been invoiced,’ etc.”

* * * * *

“* * * while it may be admitted that bringing into the United States merchandise contrary to law is not necessarily smuggling, it is undoubtedly true that all goods smuggled and clandestinely introduced into the United States are necessarily brought into that country contrary to law.”

“Smuggling is a word to be interpreted by reference to *Keck v. U.S.*, * * * a case decided upon unusual consideration.”

* * * * *

“* * * it is clear that it was intended to charge the offense created by section 593(b), and not that created by section 593(a).”

In *The J. Duffy*, 18 Fed. 2d 754 where intoxicating liquors were found on a schooner in Long Island Sound, the Court said (page 755):

“* * * if this cargo was on board a vessel in the territorial waters, it was contrary to law under the section of the Tariff Act above quoted, for we hold it was an unlawful bringing into the country.”

* * * * *

“In the case of *Keck v. United States*, supra, referred to below, was a transaction involving smuggling. The decision holds that a case of smuggling is not effected until the goods have gone beyond the customs, and that such line is not passed by goods at sea when they pass the three-mile limit and have not yet been landed.”

It is crystal clear therefore that the *Tomplain* case is utterly irrelevant to the issue at bar, and that the offense of unlawful importation and bringing into the United States, is dealt with in that case and the crime of smuggling is distinct. When the Government says in its brief (page 5):

“The authorities hold that goods are imported or brought into the United States when they enter the waters of the United States.”

it cannot refer to smuggling, and that language is directly contrary to the above quoted Duffy statement.

See also:

Tomplain v. U. S., 42 Fed. 2d 205 at 206;

U. S. v. McGill, 28 Fed. 2d 572 (Ninth Circuit)
is a complete answer to the argument of the Government.

2. APPELLANT EXPLAINED HIS POSSESSION OF THE MERCHANDISE FULLY.

Since we contend that there is not a scintilla of evidence to prove smuggling the matter of explanation of possession is wholly immaterial but if it were

material Dong, agent of appellant, who went to Marshall the customs man with his foolish suggestion, told him all about the merchandise, who it belonged to and that if it could not be landed the merchandise would be taken back to Manila. (Rep. Tr. 76, 77.) Dong told Marshall where the merchandise was located. (Rep. Tr. 84, line 23, 85, line 8.) It appears therefore that there was nothing concealed and Dong told the customs officials all about it. What more could he have said or what further explanation is necessary?

What we have said in our opening brief and hereinabove in this closing brief is sufficient answer with reference to the point made by the Government that the evidence supports the findings. Our contention is that none of the cases cited by the Government touch upon smuggling and that under *Keck* and other cases in our opening brief the crime of smuggling did not occur. Therefore, it must be apparent that the findings of the Court in the written memorandum (Vol. 1, T. 8) with reference to the intention of the defendant to defraud the Government and that he sought to move the property by *clandestine means* find absolutely no support in the evidence. There can be nothing clandestine in the movement of merchandise when a full and complete disclosure concerning the movement and the whereabouts of the merchandise is made to the interested customs officials. The word clandestine imports secrecy. There was nothing clandestine in anything the defendant did. (Appellant's Brief pages 6 to 10.)

The Government in its brief stresses (page 6) that defendant signed the quoted statement from the declaration. Whether that statement be material or not, the fact is that it is undisputed that defendant could not read or write. (Rep. Tr. 80.)

3. THE GOVERNMENT IS SILENT ON THE DUTY OF A CREW MEMBER.

We invite attention to the fact that point 3, page 11 to page 15 of our brief with reference to Customs Regulations defining the duty of a crew member is utterly without reply in the Government's brief.

CONCLUSION.

The Government states that appellant has intimated that the honorable trial judge engaged in racial discrimination. Nothing could be further from the fact. A casual reading of what was said indicates that the reference was to the customs officials, the police, not to the judiciary. There is absolutely no claim or implication of prejudicial misconduct of the Court. We stand on the statement. If one again reads the testimony of Kahler as he wrestled with his conscience the conclusion is justified that with such attitudes, no one has a Chinaman's chance.

We respectfully submit that this is a case of smuggling not of importation and the judgment should be reversed.

Dated, San Francisco, California,
January 10, 1955.

Respectfully submitted,
G. C. RINGOLE,
Attorney for Appellant.

No. 14,565

IN THE

United States Court of Appeals
For the Ninth Circuit

WILLARD A. WINHOVEN,

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

422 Post Office Building,

Seventh and Mission Streets,

San Francisco 1, California,

Attorneys for Appellee.

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No. 14,565

IN THE

**United States Court of Appeals
For the Ninth Circuit**

WILLARD A. WINHOVEN,

vs.

Appellant,

UNITED STATES OF AMERICA,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTION.

Jurisdiction is invoked under Section 2255 of Title 28 United States Code.

STATEMENT OF THE CASE.

Appellant moved the District Court for the Northern District of California for an order vacating the judgment in his case pursuant to Section 2255 of Title 28 United States Code on July 9, 1954 (Tr. 8). United States District Judge Louis E. Goodman denied appellant's motion on July 16, 1954 (Tr. 64). Appeal was then made to this Court.

FACTS.

On September 4, 1942, Winhoven and a co-defendant, Sivyer, were convicted in the District Court for the Northern District of California of the armed robbery of a United States Post Office. They received a mandatory sentence of twenty-five years imprisonment. No appeal was taken from the judgment of conviction.

More than six years later, on January 20, 1949, Winhoven filed in the District Court for the Northern District of California a motion, pursuant to 28 U.S.C., Section 2255, to vacate the judgment and sentence. The ground for relief stated was that he had been denied the effective assistance of counsel upon the trial by the appointment of the same attorney to represent both him and his co-defendant, who had conflicting interests. Solely upon the basis of the motion, and the files and records of the case, and without a hearing, Judge Roche determined that Winhoven was not entitled to relief and denied the motion. No appeal was taken.

On October 30, 1950, Winhoven filed in the District Court for the Northern District of California a petition for a writ of habeas corpus making the same claim for relief as he had in the motion to vacate. Judge Roche issued the writ and conducted a hearing upon the allegations of the petition. At the hearing, Winhoven was personally present and testified, as well as did other witnesses. Judge Roche concluded that the claims of the petition were not sustained by the

evidence, and upon written findings, he entered judgment discharging the writ and dismissing the petition. From this judgment Winhoven appealed.

The Court of Appeals refused to consider the appeal on the merits. 195 F.2d 181 (February 28, 1952). It held that the District Court for the Northern District of California was without jurisdiction to entertain the petition for a writ of habeas corpus, since a motion to vacate was the petitioner's proper remedy. It further held that, treating the petition for a writ as a second motion to vacate, the District Court for the Northern District of California was not "entitled" to consider it, because the decision on the first motion to vacate was not void and subject to collateral attack in such a second motion. Therefore Judge Roche's order dismissing the petition was affirmed.

Thereafter, on May 1, 1952 Winhoven filed in the District Court for the Northern District of California a motion, pursuant to Rule 60(b) Federal Rules of Civil Procedure, to set aside the order denying his first motion to vacate. The District Court for the Northern District of California denied his motion on the ground that no claim was made that the order was the result of mistake, inadvertence, surprise or excusable neglect. On appeal from this denial, the Court of Appeals remanded the matter to the District Court for the Northern District of California to determine whether the order denying the first motion to vacate was void, because it had been made without, according to Winhoven, a hearing (201 F2d 174, Dec.

31, 1952). In accordance with the mandate of the Court of Appeals, the District Court for the Northern District of California considered the contention that the order was void, and held that it was not, inasmuch as the failure to bring Winhoven before the District Court for the Northern District of California for a hearing upon the first motion to vacate was merely error that should have been raised on appeal. Consequently, the District Court for the Northern District of California again denied Winhoven's motion under Rule 60(b), Federal Rules of Civil Procedure, to set aside the order denying his first motion to vacate. 14 F.R.D. 18 (Mar. 7, 1953). From this denial Winhoven appealed.

Upon this appeal, the Court of Appeals agreed that the ground for relief asserted by Winhoven in his motion to set aside the order denying his first motion to vacate should have been raised on appeal from that order. But, this Court also noted that in any event the District Court for the Northern District of California was without jurisdiction to entertain the first motion to vacate because Winhoven, at the time the motion was made, was serving, concurrently with the sentence under attack, another admittedly valid sentence. For one or both of these reasons the appeal was dismissed. 209 F.2d 417 (Dec. 7, 1953).

On July 9, 1954, Winhoven filed the present and, in effect, the third motion to vacate his judgment of conviction and sentence. In this motion, he made the same claim for relief as in the previous motions; that

he was denied the effective assistance of counsel upon the trial.

(See Order granting leave to appeal in forma pauperis (Tr. 68-71).)

ARGUMENT.

I. THE DISTRICT COURT HAD NO JURISDICTION TO ENTERTAIN APPELLANT'S MOTION.

Appellant has three times been before this Court (*Winhoven v. Swope* (9th Cir.), 195 F.2d 181; *Winhoven v. United States* (9th Cir.), 201 F.2d 174; *Winhoven v. United States* (9th Cir.), 209 F.2d 417). These cases, we believe, are determinative of the appeal in this case.

Section 2255 of Title 28 United States Code provides in part as follows:

“The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.”

Winhoven first filed a motion pursuant to Section 2255 on January 20, 1949 (Tr. 68). The ground urged on that occasion was that he had been denied the effective assistance of counsel upon the trial. This same ground was urged in the instant motion (Tr. 10-14). No appeal was taken from the denial of this motion. This Court held in appellant's last case that after failing to appeal from the original 2255 “he is now without the right to seek the same relief which he

could have had by such appeal". In this case the Court also held that Winhoven's appeal was frivolous.

On October 30, 1950 Winhoven filed a petition for a writ of habeas corpus making the same claim for relief as he had in the motion to vacate (Tr. 69). A full hearing was conducted upon the merits. Winhoven was personally present and testified as well as did other witnesses (Tr. 69). The Court held that the claims of the petition were not sustained by the evidence and discharged the writ (Tr. 69). Winhoven appealed from this judgment and this Court, at 195 F.2d 181, held that the Court is without jurisdiction to entertain a writ of habeas corpus after a denial of relief under Section 2255. The Court further held that even considering the writ of habeas corpus as a second motion under Section 2255 was not one that the District Court was entitled to consider (page 183).

The present case is based on the same grounds as the case last cited and should be denied on the authority of *Winhoven v. Swope* (9th Cir.), 195 F.2d 181, 183. Appellant "not having sought certiorari, this decision is the law of the case." *Winhoven v. United States* (9th Cir.), 209 F.2d 417, 418.

On March 7, 1953, in an opinion reported at 14 F.R.D. 18, the District Court denied a motion under Rule 60(b) of the Federal Rules of Civil Procedure to set aside the order denying appellant's first motion to vacate (Tr. 70). This decision was affirmed by this Court at *Winhoven v. United States*, 209 F.2d 417. Certiorari was not sought from this decision.

Not having sought certiorari, this decision is the law of the case. *Winhoven v. United States* (9th Cir.), 209 F.2d 417, 418.

There is admittedly a valid denial of the first 2255 motion. Since Section 2255 provides that a second motion need not be entertained and this Court has held that a Court is without jurisdiction to entertain a successive motion for relief under Section 2255 (*Winhoven v. Swope*, 195 F.2d 181, 183), the District Court in the instant case was not entitled to consider appellant's motion.

Even assuming that the Court of Appeals for the Fifth Circuit is correct when it states that a Court may entertain a successive motion under Section 2255 (*Barrett v. Hunter* (5th Cir.), 180 F.2d 510; *Hallowell v. United States* (5th Cir.), 197 F.2d 926), the Court need not have done so in the present case. In the *Hallowell* case the first 2255 motion did not involve the same allegations made in the second 2255 motion. In the present case the two motions are made on identically the same ground. Therefore, there would be no reason for entertaining the second successive motion. *Winhoven* has had his case considered on the merits. Judge Roche decided the facts adversely to him on his petition for a writ of habeas corpus filed October 30, 1950 (Tr. 69). This petition could have been considered a motion under Section 2255 because addressed to the same Court which originally sentenced appellant. As a matter of fact, this Court in *Winhoven v. Swope*, 195 F.2d 181, apparently

treated the writ of habeas corpus as a second 2255 motion. Appellant received a full hearing in that case. He has had the decision on the merits that he desires. He can ask for nothing more. Appellant has had numerous chances to adjudicate his case. All decisions have been adverse to him. The present case should finally determine the Winhoven saga.

Dated, San Francisco, California,
January 17, 1955.

LLOYD H. BURKE,

United States Attorney,

RICHARD H. FOSTER,

Assistant United States Attorney,

Attorneys for Appellee.

No. 14566

**United States
Court of Appeals
for the Ninth Circuit**

ELMER W. BROWN,

Appellant,

VS.

ALASKA INDUSTRIAL BOARD, ALASKA
AGGREGATE CORPORATION and MOR-
RELL P. TOTTEN & COMPANY, INC.,

Appellees.

Transcript of Record

**Appeal from the District Court
for the District of Alaska,
Division Number One.**

FILED

JAN 26 1955

PAUL P. O'BRIEN,

CLERK

No. 14566

**United States
Court of Appeals**
for the Ninth Circuit

ELMER W. BROWN,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, ALASKA
AGGREGATE CORPORATION and MOR-
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOHN H. DIMOND,

P.O. Box 366,

Juneau, Alaska,

For Appellant.

FAULKNER, BANFIELD & BOOCHEVER, by

R. BOOCHEVER,

P.O. Box 1121,

Juneau, Alaska,

For Appellee, Alaska Aggregate Corp., et al.

J. GERALD WILLIAMS,

Attorney General,

Juneau, Alaska,

For Appellee, Alaska Industrial
Board.

In the District Court for the District of Alaska,
Division Number One, at Juneau

Civil Action No. 6981-A

ELMER W. BROWN,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, ALASKA
AGGREGATE CORPORATION, and MOR-
RELL P. TOTTON & CO., INC.,

Defendants.

STIPULATION OF FACTS

Be it remembered that the following agreed statement of record on appeal in the above-entitled cause was filed in the office of the Clerk of the District Court for the District of Alaska, First Division, at Juneau, Alaska, on the 20th day of October, 1954.

Agreed Statement

The relevant facts in this case are these:

1. Plaintiff was employed by defendant, Alaska Aggregate Corporation, at the Colorado Coal Mine, near Anchorage, Alaska, on August 29, 1952, as foreman in charge of heavy equipment and labor. In such employment he worked twelve hours per day, seven days per week, and his wage was at the rate of \$3.65 per hour—giving him an average weekly “take-home” pay of \$319.00. On or about September 15, 1952, he suffered an accidental in-

jury to his left knee in the course of such employment, and after laying off work for about two days he continued such employment until November 24, 1952, when he went to Seattle, Washington. On December 16, 1952, he underwent a cartilage operation on his left knee and resumed other employment on February 16, 1953.

2. In respect to such injury, the defendant, Alaska Aggregate Corporation, paid plaintiff, under the provisions of the Alaska Workmen's Compensation Act, the following:

a. All medical expenses.

b. Temporary disability compensation in the sum of \$691.98 for the period December 17, 1952, to February 15, 1953, which was based on an "average daily wage earning capacity," within the meaning of the "Temporary Disability" section of the Alaska Workmen's Compensation Act, of \$17.20.

c. Partial permanent disability compensation in the sum of \$708.75, representing a 17½% loss of use of the injured leg.

3. Plaintiff was a resident of the State of Washington and customarily resided there, and not in Alaska. His usual occupation was that of a "cat skinner," and during the period of his disability, i.e., November 24, 1952, to February 16, 1953, the "going" rate for cat skimmers in Washington was \$120.40 per week, or \$17.20 per day.

4. Plaintiff's employment record for 1951 and 1952 was as follows:

a. During the year 1951 plaintiff earned a total of \$6,126.48. Of this amount, \$993.00 was earned in employment with the L. G. Wingard Packing Company in Alaska; the balance was earned in the State of Washington. With respect to the latter amount (\$5,133.48), no showing was made as to which portion, if any, was earned during the period November 24, 1951, to January 1, 1952.

b. In 1952, the names of his employers, the dates of employment and the amounts earned were as follows:

Employer and Period of Employment:

Builders Equipment, Rental, Edmonds, Wash.; all of January and part of February 1952.

Amounts earned (40-hour week) . \$ 1,215.79

Employer and Period of Employment:

Campbell-Atherton Co., Arlington, Wash.; March 1-May 15, 1952.

Amounts earned (40-hour week) . 1,306.08

Employer and Period of Employment:

Morrison-Knudsen Co., Anchorage, Alaska; May 15-June 19, 1952.

Amounts earned (40-hour week) . 918.00

Employer and Period of Employment:

Wingard Packing Co., Ugashik, Alaska; June 19-Aug. 1, 1952.

Amounts earned 2,353.10

Employer and Period of Employment:

Wm. J. Halleran, Seattle Washington; 10 days in Aug., 1952.

Amounts earned 124.70

Employer and Period of Employment:

Patti-McDonald Const. Co., Anchorage, Alaska; 10 days in Aug., 1952.

Amounts earned 186.55

Employer and Period of Employment:

Alaska Aggregate Corp., Anchorage, Alaska; Sept. 1-Nov. 24, 1952.

Amounts earned (84-hour week). 3,901.59

Total\$10,005.81

5. Defendants' computation of the amount of temporary disability compensation paid (\$691.98) was grounded upon their view that plaintiff's "average daily wage earning capacity," within the meaning of the "Temporary Disability" section of Section 43-3-1 ACLA, was \$17.20—this being the amount that plaintiff would have earned daily in the State of Washington had he been employed there as a cat skinner during the period of his disability, i.e., November 24, 1952, to February 16, 1953. Plaintiff was not satisfied with this, his thought being that he ought to have received compensation based upon a higher average wage earning capacity, as computed, for example, by the total wages earned by him during 1952, the year of his injury; and hence, he filed with the Alaska Industrial Board on November 12, 1953, his application

for adjustment of claim. The matter was heard before the full Board of three members on December 17, 1953, and the Board, with one member dissenting, on January 8, 1954, awarded plaintiff compensation for temporary total disability for the period November 24, 1952, to February 16, 1953, on the basis of an average wage earning capacity of \$13.07 per day. Defendants have waived any right to reimbursement for the amount paid by them in excess of the sum of \$13.07 per day.

6. From this decision of the Alaska Industrial Board plaintiff appealed to the District Court on January 27, 1954, under the provisions of Section 43-3-22 ACLA 1949; and on July 19, 1954, that Court, without opinion, made and entered its findings of fact, conclusions of law and decree affirming the decision and award of the Alaska Industrial Board. Plaintiff filed his notice of appeal from such decree to the United States Court of Appeals for the Ninth Circuit on August 10, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants-Appellees, Alaska Aggre-
gate Corp. and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,
Attorney General of Alaska;

By /s/ ELMORE A. MERDES,
Assistant Attorney General, Attorney for Defendant-Appellee,, Alaska Industrial Board.

Approved: Oct. 23, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed October 20, 1954.

Alaska Industrial Board
Juneau, Alaska
Case No. 2-10-19
Docket No. 249

ELMER W. BROWN,
Applicant,
vs.

ALASKA AGGREGATE CORPORATION and
MORRELL P. TOTTEEN & CO.,
Defendants.

AWARD

This matter came on for hearing before the Full Board on December 17, 1953, pursuant to the application of Elmer W. Brown. Applicant was represented by Attorney William L. Paul, Jr., and defendant was represented by Attorney Robert Boo-

chever of counsel Faulkner, Banfield and Boochever. The Board heard argument of counsel and considered the case on the merits, and made these

Findings of Fact

Applicant is a 42-year-old married man with one dependent minor child. While employed by Alaska Aggregate Corporation as a foreman on September 15, 1952, at the Colorado Coal Mine he was struck by a steel girder on his left knee, resulting in a mild tear of the semi-lunar cartilage. He was treated by Dr. Harold Sogn of Anchorage, Alaska, and by Dr. Ernest Burgess and Hoe Brugman of Seattle, Washington, and underwent surgery on December 16, 1952.

The files in this case show applicant earned \$6,126.48 during the year 1951 and earned \$10,005.81 during the year 1952, as evidenced by copies of his Internal Revenue filings.

Award

Applicant is awarded compensation for temporary total disability for the period November 24, 1952, to February 16, 1953. Applicant's earning capacity is hereby determined to be \$13.07 per day.

January 8, 1954.

[Seal] /s/ NEIL F. MOORE,
Member;

/s/ J. GERALD WILLIAMS,
Member.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter, coming on to be heard before the court on the complaint and appeal filed by the plaintiff, and the plaintiff having been represented by W. L. Paul, Jr., and the defendants, Alaska Aggregate Corp. and Morrell P. Totten & Company, Inc., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, and attorneys for the plaintiff and defendants having entered into a stipulation to submit the matter for determination by the court upon briefs, and the court having reviewed the documentary evidence presented to the Alaska Industrial Board and briefs having been submitted, the court makes the following

Findings of Fact

1. On or about September 15, 1952, Elmer W. Brown alleges that he twisted his knee while working for the defendant, Alaska Aggregate Corp.
2. Said employee continued with his work until his job with the defendant, Alaska Aggregate Corporation, terminated on November 24, 1952.
3. While employed by the Alaska Aggregate Corp. employee received average weekly wages of \$319.00.

4. On December 16, 1952, employee underwent an operation on his knee, resuming employment on February 16, 1953.

5. The defendant employer and defendant insurance company paid the employee \$708.75, representing 17½% loss of use of the leg involved, and also paid temporary disability in the additional amount of \$681.98 based on an average daily wage of \$17.20. In addition, the employer paid all medical expenses involved.

6. Employee was a resident of the State of Washington and customarily resided there when not employed in Alaska.

7. During the period employee was disabled, the going rate for cat skinners, employee's usual occupation, in the State of Washington was \$120.40 per week or \$17.20 per day.

8. Employee's wages during the year 1951 totalled \$6,126.48 and during the year 1952, \$10,005.81.

9. Applicant's proof of his earnings during the period of the preceding year corresponding to the period he claimed to be disabled as a result of the alleged injury of September 15, 1952, revealed earnings from November 1, 1951, to May 15, 1952, in the amount of \$2,521.78.

10. Applicant's average daily wage earning capacity during the period November 1, 1951, to May 5, 1952, was \$12.93 per day.

11. The Alaska Industrial Board entered its decision and award on January 8, 1954, allowing applicant compensation for the period November 24, 1952, to February 16, 1953, based on an average daily wage of \$13.07 per day.

From the foregoing Findings of Fact, the court makes the following

Conclusions of Law

1. There was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining employee's average daily wage during the period of his disability to be \$13.07 per day.

2. The decision of the Alaska Industrial Board should be affirmed and defendants should have judgment against the plaintiff for their costs and disbursements, including a reasonable attorney's fee of \$.....

Done in Open Court this 19th day of July, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed in open Court July 19, 1954.

In the District Court for the District of Alaska,
Division Number One, at Juneau

Civil Action File No. 6981-A

ELMER W. BROWN,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD and ALASKA
AGGREGATE CORP. and MORRELL P.
TOTTEN & COMPANY, INC.,

Defendants.

DECREE

This Matter, having come on to be heard before the court on the complaint and appeal filed by the plaintiff, the plaintiff having been represented by W. L. Paul, Jr., and the defendants, Alaska Aggregate Corp., and Morrell P. Totten & Company, Inc., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, the attorneys for plaintiff and defendants having entered into a stipulation to submit the matter for determination by the court upon briefs, the court having reviewed the documentary evidence presented to the Alaska Industrial Board and briefs having been submitted, and the court having entered its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the decision of the Alaska Industrial Board, dated January 8, 1954, be and the same is hereby

affirmed, and defendants are awarded judgment against the plaintiff for their costs and disbursements, including an attorney's fee of \$.

Done in Open Court this 19th day of July, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed in open court July 19, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on the 19th day of July, 1954.

Dated August 10, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

[Endorsed]: Filed August 12, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, Elmer W. Brown, as principal, and Indemnity Insurance Company of North America, a corporation, as

surety, are held and firmly bound unto Alaska Industrial Board and Alaska Aggregate Corp., and Morrell P. Totten and Company, Inc., as defendants, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Alaska Industrial Board and Alaska Aggregate Corp. and Morrell P. Totten and Company, Inc., its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of August, 1954.

Whereas, on July 19, 1954, in an action pending in the District Court of the United States for the Territory of Alaska, 1st Division, between Elmer W. Brown, as plaintiff, and Alaska Industrial Board and Alaska Aggregate Corp. and Morrell P. Totten and Company, Inc., defendants, an order granting a motion to dismiss was entered against the said Elmer W. Brown, and the said Elmer W. Brown having filed in said Court a notice of appeal from such order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such that if the said Elmer W. Brown shall prosecute his appeal to effect, and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said Elmer W. Brown, if the judgment is modified

or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

ELMER W. BROWN,

By /s/ JOHN H. DIMOND,
Of His Attorney,
Principal.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

By /s/ HENRY R. BUCK,
Attorney-in-Fact,
Surety.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

STIPULATION

Whereas, notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above cause was filed herein on August 12, 1954, and the time for filing the record on appeal and docketing the appeal will, without extension by order of this court, expire on September 21, 1954;

Now, Therefore, it is stipulated between the attorneys for the respective parties herein that plaintiff be given up to and including November 1, 1954, to file the record on appeal and docket the same in the United States Court of Appeals for the Ninth

Circuit, and that an order to that effect be entered herein.

Dated at Juneau, Alaska, this 11th day of September, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants, Alaska Aggregate Corp.,
and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,
Attorney General of Alaska.

By /s/ J. GERALD WILLIAMS,
Attorney for Defendant,
Alaska Industrial Board.

[Endorsed]: Filed in open Court September 20,
1954.

[Title of District Court and Cause.]

ORDER

Upon consideration of the stipulation, dated September 11, 1954, between the attorneys for the respective parties to this action, it is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of

Appeals for the Ninth Circuit in the above cause is extended to and including November 1, 1954.

Dated at Juneau, Alaska, this 20th day of September, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed September 20, 1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY PLAINTIFF

Plaintiff proposes on his appeal to the United States Court of Appeals in the above cause to rely upon the following points as error:

1. The court erred in holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was \$13.07 per day.

This was error because the evidence clearly showed that plaintiff's "average daily wage earning capacity," within the meaning of the "temporary disability" clause of Section 43-3-1 ACLA 1949, was greater than \$13.07 per day.

2. The court erred in entering its decree in favor of the defendants and in affirming the decision and award of January 8, 1954, of the Alaska Industrial

Board, and in giving judgment to defendants against plaintiff for the former's costs and attorneys' fees.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 20, 1954.

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that in printing the record to be used in the appeal of this cause to the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers except on the first page of the record, and that there shall be inserted in place of such titles on all papers used as part of such record the words: "title of district court and cause"; and that all endorsements on all papers used as part of such record may be omitted except the clerk's filing marks and admissions of service.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,

Attorneys for Defendants-Appellees, Alaska Aggregate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,

Attorney General for Alaska;

By /s/ EDWARD A. MERDES,

Attorney for Defendant-Appellee, Alaska Industrial Board.

[Endorsed]: Filed October 20, 1954.

[Title of District Court and Cause.]STIPULATION AS TO CONTENTS OF
RECORD ON APPEAL

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that the transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above cause, shall comprise the following and only the following:

1. The Alaska Industrial Board's award of January 8, 1954.
2. Findings of fact and conclusions of law.
3. Decree.
4. Notice of appeal and cost bond on appeal.

5. Statement of points relied upon by appellant.
6. Stipulation re printing of record.
7. Stipulation and order re extension of time for filing record on appeal.
8. Agreed statement as record on appeal.
9. This stipulation.

Dated: October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants-Appellees, Alaska Aggre-
gate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,
Attorney General for Alaska;

By /s/ EDWARD A. MERDES,
Attorney for Defendant-Appellee, Alaska Industrial
Board.

[Endorsed]: Filed October 20, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 27th day of October, 1954.

[Seal]

J. W. LEIVERS,

Clerk of the District Court,

By /s/ P. D. E. McIVER,
Chief Deputy.

[Endorsed]: No. 14566. United States Court of Appeals for the Ninth Circuit. Elmer W. Brown, Appellant, vs. Alaska Industrial Board, Alaska Aggregate Corporation and Morrell P. Totten & Company, Inc., Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed October 28, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14566

ELMER W. BROWN,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, ALASKA
AGGREGATE CORP., and MORRELL P.
TOTTEN & CO., INC.,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF PARTS OF REC-
ORD TO BE PRINTED

Appellant above named adopts the "statement of points to be relied upon by plaintiff," filed with the Clerk of the District Court, as his statement of points to be relied upon in the United States Court of Appeals for the Ninth Circuit, and prays that the whole of the record as filed and certified be printed.

Dated: October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed November 1, 1954.

No. 14,566

IN THE

United States Court of Appeals
For the Ninth Circuit

ELMER W. BROWN,

Appellant,

VS.

ALASKA INDUSTRIAL BOARD, ALASKA AG-
GREGATE CORPORATION and MORRELL P.

TOTTEN & COMPANY, INC.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLANT.

JOHN H. DIMOND,

Juneau, Alaska,

ROY E. JACKSON,

1207 American Building, Seattle, Washington,

Attorneys for Appellant.

FILED

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PAUL P. O'BRIEN,
CLERK

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TOTTEN & COMPANY, INC.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLANT.

OPINION BELOW.

The District Court did not render an opinion in this case.

JURISDICTION.

This is an appeal from an award of the Alaska Industrial Board brought to the District Court under the provisions of §43-3-22 ACLA 1949. (R. 7.) On July 19, 1954, the District Court, without opinion, entered its decree affirming the award of the Board.

(R. 7, 13.) An appeal from such decree was taken on August 12, 1954, by filing with the District Court notice of appeal. (R. 14.) The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 USCA §101; the jurisdiction of this Court on §1291 of the Federal Judicial Code.

STATEMENT.

Appellant adopts as his statement of the case, the Agreed Statement set out in the Record at pages 3-7.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, *infra*.

QUESTIONS PRESENTED.

1. Whether the Alaska Industrial Board, in determining appellant's average daily wage earning capacity, made findings of fact in compliance with the provisions of §43-3-16 ACLA 1949.

2. Whether the facts in this case justify the determination by the Alaska Industrial Board and by the District Court that during the period of appellant's disability his average daily wage earning capacity, within the meaning of the "Temporary Disability" section of §43-3-1 ACLA 1949 was \$13.07 per day.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In not making sufficient findings of fact, in compliance with the provisions of §43-3-16 ACLA 1949, to support its determination that appellant's average daily wage earning capacity during the period of his disability was \$13.07 per day.

2. In holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was \$13.07 per day.

3. In entering its decree in favor of the appellees and in affirming the decision and award of January 8, 1954, of the Alaska Industrial Board, and in giving judgment to appellees against appellant for the former's costs and attorney's fees.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

These facts are not in dispute: That appellant was injured by accident in the course of his employment with appellee, Alaska Aggregate Corporation (R. 3-4); that at the time of such injury, September 15, 1952, his average weekly "take-home" pay was \$319.00, or approximately \$45.57 per day (R. 3); that by reason of such injury appellant suffered a "temporary disability" within the meaning of the "temporary disability" provision of §43-3-1 ACLA 1949,

for the period November 24, 1952, to February 16, 1953 (R. 4); and that he was entitled to temporary disability compensation during that period by virtue of that provision of the statute. What is in dispute is the amount of compensation to which appellant was entitled, and the answer to this depends upon the proper construction, and application in this case, of that part of the statute above mentioned. Such section on temporary disability reads as follows:

“[Temporary disability.] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

“Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

“The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the In-

dustrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

Prior to the Alaska Industrial Board’s award of January 8, 1954, appellees had paid appellant temporary disability compensation at the rate of 65% of \$17.20, or, \$11.18 per day. This constituted appellees’ determination of appellant’s “average daily wage earning capacity”, and presumably, this determination was based upon the facts, as they appear in the Record, that appellant was a resident of the State of Washington and customarily resided there, and not in Alaska; that his usual occupation was that of a “cat-skinner”; and that the “going” rate for cat-skinners during the period of disability, November 24, 1952, to February 16, 1953, averaged \$17.20 per day. (R. 4.)

The Industrial Board, similarly, ignored appellant’s actual earnings at the time of the injury, and without indicating in any manner whether it had any “regard for the nature of his injury, the degree of temporary impairment, etc.” (§43-3-1 [Temporary Disability] ACLA 1949), or upon what facts it based its determination, the Board simply stated: “Applicant’s earning capacity is hereby determined to be \$13.07 per day.” (R. 9.) Perhaps the Board knows how it arrived at this figure; certainly, no one else can determine this.

It is appellant's position (1) that both parties are wrong—appellees, in computing an average earning capacity of \$17.20 per day, and the Industrial Board, in arriving at its figure of \$13.07 per day; and (2) that appellant's actual earnings at the time of his injury fairly and reasonably represented his daily wage earning capacity, and if not that, then based upon his actual earnings for the year of injury, his average earning capacity was certainly considerably more than \$17.20 per day.

I. IT WAS REVERSIBLE ERROR TO HAVE NOT MADE FINDINGS OF FACT IN COMPLIANCE WITH THE PROVISIONS OF §43-3-16 ACLA 1949.

Although the Board did not say so, it presumably can be implied from its finding that appellant's wage earning capacity was \$13.07 per day (R. 9), the initial determination that appellant's actual earnings, at the time of his injury, did not "fairly and reasonably represent his daily wage earning capacity". §43-3-1 "Temporary Disability". This being the case, it was then the duty of the Board to fix such earning capacity after having "due regard" to each of the following:

1. The nature of the injury.
2. The degree of temporary impairment.
3. Appellant's usual employment.
4. Any other factor or circumstance in the case which may have affected his capacity to earn wages in his temporarily disabled condition.

It is impossible to tell from the record in this case, because of the simple conclusion that appellant's earning capacity was \$13.07 per day (R. 9), what the above factors had to do with this determination of earning capacity. In fact, the Board's findings were so lacking in particularity, that it is safe to assume that no regard at all was had to those items specified in the statute.

What, then, the Board has done is to make an award of \$13.07 per day for a certain period, but it has failed to accompany this with the "findings of fact upon which it is based * * *", §43-3-16 ACLA 1949. Such findings, it would seem, should be obligatory. If the law were otherwise, there would be nothing to prevent a Board, in respect to temporary compensation awards, from making an arbitrary choice of some figure supposedly representing one's average wage earning capacity—a figure which would bear no logical relation to the injured person's actual earning capacity during the period of his disability, his "usual earnings", the nature of his injury, or the degree of temporary impairment—and base an award on that figure. The whole purpose and intent of the Workmen's Compensation Law—to fairly compensate one for loss of earnings during the period of his disability—would thus be frustrated, and sanction of the Board's action in this respect would be given by the Courts if the latter would hold, upon review of the Board's decision on any such case, that it thus sufficiently complied with the provisions of law requiring findings of fact upon which an award is based.

That is precisely the case here. There is no conceivable way to determine from the Board's decision and award of January 8, 1954, what relation, if any, the figure of \$13.07 per day bears to appellant's usual earnings, the nature of his injury, or the degree of his temporary impairment. The failure of the Board, and the District Court, to indicate in any degree the basis for the award made and the determination that appellant's earning capacity was \$13.07 per day, constitutes a failure to comply with the provisions of §43-3-16 ACLA 1949, and has made it impossible for this reviewing Court to determine whether there was any substantial evidence in the Record which would support this determination. This, it is submitted, was error, and sufficient reason for reversing the decision of the District Court. See *DeVore v. Maidt Plastering Co.*, 205 Okla. 610, 239 P. 2d 520; *Fireman's Fund Ins. Co. v. Peterson*, CA-9, 120 F. 2d 547, 548; *Howard v. Monahan*, 33 F. 2d 220.

II. THE EVIDENCE DOES NOT SUPPORT THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

Even if it could be held that the Board's decision that appellant's daily average wage earning capacity was \$13.07 was a "finding" in sufficient compliance with §43-3-16 ACLA 1949 (which appellant does not admit), still, there is no substantial evidence in the Record to support this determination. Rather, the evidence clearly supports the fact that appellant's

earning capacity was considerably more than the amount determined by the Board and the District Court.

The Alaska statute on this subject, §43-3-1 "Temporary Disability", measures one's earning capacity under two situations: (1) by his actual earnings at the time of injury, "... if such actual earnings fairly and reasonably represent his daily wage earning capacity", and (2) if such earnings do not fairly represent such capacity, then by what does constitute "reasonable" wage earning capacity, "having due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

The law, however, is silent on the subject of exactly when one's actual earnings do represent his average earning capacity, and when not, and, if not, what they amount to; in other words, there is an absence of any precise formula by which those determinations can be made. In such a situation it is necessary to consider the real objective of wage calculation, which is to arrive at a fair approximation of the injured employee's future earning capacity, and not to be influenced by the thought that a compensation theory is necessarily satisfied when a mechanical representation of the claimant's earnings in some arbitrary past period is used as a wage basis. It must be remembered at all times that an injured workman's disability reaches into the future, and not the past, and

that his loss as a result of such disability has an impact only on probable future earnings. See Larson, *Workmen's Compensation Law*, Vol. 2, page 71, §60.11; *St. Paul-Mercury Indemnity Co. v. Idov*, 88 Ga. 697, 77 SE 2d 327, 329.

With this in mind, it would be reasonable then to give this construction to the statute:

1. Actual earnings at the time of injury should be used as the basis for temporary compensation, where the type of employment engaged in by the workman at the time of injury is of a regular, permanent and steady character.

2. Where the employment is discontinuous or irregular, actual earnings cannot be used; in such case, the average wage earning capacity would have to be determined with consideration given to a history of the employee's earnings in other employment, together with his "capacity", that is, his fitness, willingness and readiness to work, considered in connection with opportunity to work.

Thus, giving proper consideration to the realities of temporary total disability, and the objectives of the law on this subject, it would be perfectly proper and logical to so interpret the temporary disability section of the Alaska statute, and under such construction, that is, under either "(1)" or "(2)", *supra*, the evidence in this case clearly shows that the Board's figure of \$13.07 per day, as appellant's average daily wage earning capacity, was far below that amount which, in reality, would represent his loss of earnings during his period of disability.

1. *Actual Earnings.*

It is appellant's principal contention that he ought to have had temporary disability compensation based upon his earnings at the time of his injury, that is, either on an average figure of \$319.00 per week, or \$45.57 per day (R. 3), or, in the event that the overtime that he had been putting in could not fairly be considered as "average", then at least at his hourly rate of \$3.65 an hour for an eight-hour day, or \$29.20 per day. (R. 3.) It is true that the evidence shows, for the year of appellant's injury, a record of employment from the beginning of the year to September 1 which could be termed intermittent or discontinuous. (R. 5-6.) But it is noteworthy that although appellant had worked for six different employers in that eight-month period, his longest period of continuous, uninterrupted employment for that year was with appellee, Alaska Aggregate Corporation—from September 1, 1952, until November 24, 1952—and that here his earnings were the largest. (R. 6.) Moreover, although evidence was introduced showing that appellant was still domiciled in the State of Washington, that his regular employment there was that of a cat-skinner, and that if he had been employed in the State of Washington as a cat-skinner during the period of his disability, he would have earned \$17.27 per day, there was also in the record much more important evidence. And this consists of the fact that when appellant suffered the injury which gave rise to his disability, he had achieved something higher in the ranks of the wage-earner in the construction trade, that is, that of a foreman in charge of

heavy equipment, and had thus graduated or had been promoted from the category of "cat-skinner" to a position of considerably greater achievement. In addition, there was no evidence at all indicating that he severed his employment with appellee, Alaska Aggregate Corporation, for any reason other than that of his injury, and that except for the injury, such employment would not have continued as full time work. Thus, there is every reason to presume that once having attained this good, full time employment, superior to anything he had had in the past, appellant would have maintained himself at that level in the future. The inherent quality, then, of appellant's work with Alaska Aggregate Corporation, was continuous, permanent and steady; and being so, compensation based upon the earnings of that employment, rather than those which preceded it, would fairly compensate appellant for the loss of earning capacity which was sustained. This, it is submitted, is what the Alaska statute contemplates; the interpretation and conclusion that leads to consequences that are just. Cf. *St. Paul-Mercury Indemnity Co. v. Idov*, 88 Ga. 697, 77 SE 2d 327, 329; *O'Hearne v. Md. Casualty Co.*, CA-4, 177 F. 2d 979.

2. Assuming, *arguendo*, that appellant's actual earnings do not represent his average earning capacity, it is clear from an application of the second test mentioned above to these facts that such earning capacity logically must be considerably more than that found by the Board. Previous employment history now is of some significance, and in such respects, the record shows these facts:

(a) At the time, subsequent to his injury, that appellant left the employment of appellee, Alaska Aggregate Corporation, on November 24, 1952, he had been, with the exception of possibly a few days in February and August, steadily employed all of that year.

(b) In such steady and continuous employment (including that with Alaska Aggregate), his total gross earnings were \$10,005.81.

(c) The period January 1, 1952, to November 15, 1952, constitutes 320 days, and thus, appellant's average daily wage for such period was \$31.26.

(d) Assuming that such "average" must be computed for the entire year, or 366 days, then his average daily wage was \$27.06. (R. 5-6.)

What better evidence is there that, under that construction of the Alaska statute which would not justify actual earnings at the time of injury to be used as the sole measure, appellant's earning capacity must have been, during the period of his disability, considerably more than the \$13.07 per day which the Board allowed (R. 9), and even more than that acknowledged by appellees, or \$17.20 per day (R. 6)? As pointed out in the first part of this brief, it is impossible to ascertain from these facts how the Board's computation was made, or how it is justified; and appellees' theory of \$17.20 is illogical and contrary to the evidence, for there is no relation whatever between this nine and one-half months of continuous employment during which an average of \$31.26 a day

was earned, and appellees' purely hypothetical situation that if appellant had not been injured, and if he had been working in Seattle during the period of his disability, and if he had been employed there as a cat-skinner, and if such employment had been on the basis of a forty-hour week—that he would then have averaged \$17.20 per day.

The Record speaks for itself, and the facts there, and not appellees' hypotheses, show "capacity", that is, appellant's fitness, readiness and willingness to work, considered in connection with his opportunities to work, and that "capacity" is the key word, the test of what appellant has lost in earnings by reason of his injury. Cf. *Mahoney Co. v. Marshall*, 46 F. 2d 539, affirmed in 56 F. 2d 74. (CA-9.)

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Juneau, Alaska,
February 23, 1955.

JOHN H. DIMOND,
ROY E. JACKSON,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

§43-3-1 [*Temporary Disability.*] ACLA 1949

“For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

“Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

“The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

§43-3-16 ACLA 1949

“Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.”

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Appellees.

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BRIEF OF APPELLEES
ALASKA AGGREGATE CORPORATION AND
MORRELL P. TOTTEN & COMPANY, INC.

FAULKNER, BANFIELD & BOOCHEVER,

Box 1121, Juneau, Alaska.

Attorneys for Appellees Alaska

Aggregate Corporation and Morrell

P. Totten & Company, Inc.

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Appeal from the District Court for the
District of Alaska, First Division.

BRIEF OF APPELLEES

**ALASKA AGGREGATE CORPORATION AND
MORRELL P. TOTTEN & COMPANY, INC.**

FACTS.

Elmer W. Brown was employed by the Alaska Aggregate Corporation at the Colorado Coal Mine near Anchorage, Alaska, for the period from August 29, 1952 through November 24, 1952. He claimed that he injured his knee on September 15, 1952. He continued his work until November 24 when he returned to his home in Seattle, Washington. On December 16, 1952, he underwent an operation on his knee. He was able to resume employment on February 15, 1952.

Brown's regular occupation was that of a "cat skinner" and the going rate for a "cat skinner" in the State of Washington during the period of his disability was \$17.20 per day.

During the year 1952, Brown had been employed by seven different employers, four being Washington employers and three Alaskan employers. He worked a total of 170 days in Alaska employment during which time he earned a total of \$7,359.24. During the 158 days he was in the State of Washington prior to November 24, 1952, his total earnings were \$2,646.57, an average of \$16.74 per day.

Brown's annual earnings for 1951 totalled \$6,126.48, but no showing was made of the amount of earnings during the period of the previous year analogous to the period of alleged disability, November 24 to February 15, although the sole reason that Brown brought his claim before the Alaska Industrial Board was in an effort to secure an increase in compensable average daily wage from the rate of \$17.20 per day on which basis he was paid by the employer. He also received his medical expenses and payment of \$708.75 for permanent partial disability representing 17½% loss of use of the leg, about which items there was no dispute.

Despite the absence of any showing that Brown was disabled between the date of termination of his employment on November 24 and the date of his operation on December 16, 1952, the Alaska Industrial Board awarded him compensation for the period from

November 24 to February 15, the day he was admittedly able to resume employment. The Board fixed his average daily wage earning capacity during his period of disability at \$13.07 per day, apparently based on the proof of earnings for the period November 1, 1951 to May 15, 1952.

No objection was made to any failure of the Alaska Industrial Board to make findings of fact or any specific findings, nor was this raised as an objection to the award on appeal to the District Court. The learned judge for the United States District Court for the District of Alaska affirmed the decision of the Alaska Industrial Board, finding the facts as set forth in the transcript at pp. 10 to 12. From that decision, appellant has brought this appeal. In appellant's statement of points relied upon, no mention was made of any objection to alleged failure of the Industrial Board to make findings of fact or particular findings.

ARGUMENT.

I.

APPELLANT IS PRECLUDED FROM ATTACKING THE DECISIONS BELOW IN REGARD TO ANY ALLEGED DEFICIENCY OF THE FINDINGS OF FACT SINCE APPELLANT MADE NO OBJECTION IN THAT REGARD BEFORE THE ALASKA INDUSTRIAL BOARD OR THE UNITED STATES DISTRICT COURT, OR IN HIS STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

Appellant contends that there was a failure to make findings of fact as required by Sec. 43-3-16, ACLA

1949. This section specifies: "If an application for review is made to the Industrial Board . . . the full board . . . shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith." In the subject case, a hearing was held before the full membership of the Alaska Industrial Board. At that hearing, Mr. Brown submitted income tax returns revealing earnings during the year 1951 in the amount of \$6,126.48. He also submitted an income tax return for the year 1952 showing total earnings of \$10,005.81. The earnings for 1951 were not broken down, although they indicated that most of the work was performed in the State of Washington and that, in addition, Mr. Brown worked as a fisherman in Alaska during the fishing season. In 1952 his employment from January to May 15 was in the State of Washington. No showing was made as to his actual employment during the months of November and December 1951, or as to any earnings which Brown may have had during that period of time. This information was peculiarly within the knowledge of applicant.

The Alaska Industrial Board most generously allowed Brown compensation for the period from November 24, 1952, the day he departed from Alaska to Seattle, to February 16, 1953 when next he was employed, although he did not secure an operation on his leg until December 16, 1952. The Alaska Industrial Board in its Decision and Award referred to the internal revenue filings of Mr. Brown and con-

cluded "that his earning capacity is hereby determined to be \$13.07 per day." No objection was made by counsel for appellant in regard to any failure of the Board to set out in detail the internal revenue filings upon which the Board obviously based its award, nor was any objection made to the absence of any specific findings.

The appellant then filed his appeal with the United States District Court, which complaint and appeal merely alleged, insofar as is material here: "The said award was in error as a matter of law in that the average daily wage earning capacity of the plaintiff was \$10,005.81 annually instead of \$13.07 per day." No mention was made of any failure to file findings of fact or specific findings of fact, and no argument to that effect was made before the United States District Court.

In designating the points relied upon for appeal to this honorable court, learned counsel for appellant made no mention of any deficiency in Alaska Industrial Board decisions or the District Court decree in regard to failure of the Board to make specific findings of fact. Due to appellant's failure to set forth this objection in the statement of points relied upon, it was not deemed necessary to include appellant's complaint and appeal to the United States District Court which made no mention of any alleged deficiency in regard to the findings of the Alaska Industrial Board.

In the case of *Western Nat. Ins. Co. v. LeClare*, 163 F.2d 337, this honorable court stated:

“Three points argued by appellant were that the evidence is neither clear nor convincing; that it does not show Raymond’s authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare’s authority to act for or on behalf of appellee. These points were not stated in appellant’s statement of points and hence need not be considered by us.”

The general rule as pertains to objections to findings of fact is set forth in 4 C.J.S., Sec. 310, as follows:

“As a rule, only objections to the findings of fact or conclusions of law, or to the want thereof, which have properly been brought to the attention of the trial court will be considered on appeal, unless no opportunity was given to present the question. Accordingly, it cannot be objected for the first time on appeal that the findings are indefinite or incomplete, informal, or not sufficiently specific . . .”

In the case of *Northwestern Steamship Co. v. Cochran*, 191 F. 146, it was stated:

“The defense that the plaintiff was not the real party in interest was not made in the pleadings, nor was it suggested in the court below. The objection ‘that plaintiff is not the real party in interest, and hence has no right to sue, comes too late when made for the first time in the appellate court.’ ”

This case involved an appeal from the United States District Court for the District of Alaska, Second Judicial Division.

This same, well established rule was enunciated by this learned court in the case of *DeJohn et al v. Alaska Matanuska Coal Co. et al, Agostino v. Same*, 41 F.2d 612, wherein the court stated:

“There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver’s hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us.”

The *DeJohn* case is another case which was taken on appeal from a decision of the United States District Court for the District of Alaska.

These cases would certainly appear to be controlling as pertains to the objection now raised by appellant to the findings of fact since no objection was made in that regard either before the Alaska Industrial Board or the United States District Court. Certainly the United States District Court should have been given the opportunity to rule on this question had appellant desired to raise this issue and, furthermore, objections should have been taken before the Alaska Industrial Board as well.

The general requirements as to the necessary procedural steps to be taken before a question may be raised on appeal apply to workmen’s compensation questions as well as to other matters. Thus it is stated in 146 A.L.R. 125:

“Of course, a party who wants to attack a compensation award for lack of requisite express findings may be required to take appropriate procedural steps, such as seasonably to request the

administrative tribunal to make certain findings of fact. And he may waive the deficiency in the award." See *Ruud v. Minneapolis Street R. Co.*, 202 Minn. 480, 279 N.W. 224; *State ex rel Probst v. Haid*, 333 Mo. 390, 62 S.W.2d 869; *Chicago & E. R. Co. v. Kaufman*, 78 Ind. App. 474, 133 N.E. 399.

In a similar situation involving alleged deficiencies in the findings of an administrative tribunal, the Eighth Circuit Court of Appeals stated:

"We decline to consider this assignment of error for the reason that it appears from the transcript of record that no such question as that presented by the assignment ever was submitted either to the referee in bankruptcy or to the District Court. The only question passed on by the referee and the District Court and the only question submitted to them was whether the conditional sales contract involved in the case was lawfully acknowledged. There is no support anywhere in the transcript of record for the allegations of fact set out in this assignment of error, that the petition in involuntary bankruptcy and the schedules were filed on the same day and that the schedules did include acknowledgment of the existence of the conditional sales contract, and that it was a valid lien on the farm tractor." See *In re Elliott*, 72 F.2d 300 at 303.

Not only is the appellant precluded from objecting to the findings made by the Alaska Industrial Board, but it is apparent that adequate findings were made. The findings of the Board referred to the internal revenue filings which contained the specific facts.

The cases cited by appellant for the most part do not appear to be relevant. Thus the case of *Howard v. Monahan*, 33 F.2d 220, involved a case where no findings whatsoever had been entered by a Deputy Commissioner, although specifically instructed to make findings by the Compensation Commission.

In *Fireman's Fund Ins. Co. v. Peterson*, 120 F.2d 547, 548, cited by appellant at page 8 of his brief, the only question was whether the decision of the Commissioners was in accordance with the law and findings were not involved.

In the case of *DeVore v. Maidt Plastering Co.*, 205 Okla. 610, 239 P.2d 520, the findings failed to indicate on what theory the Commissioner had proceeded since they did not indicate whether the claimant "did not sustain an injury resulting in a strain to his back or whether it intended to find that he did receive such an injury, but that such injury did not constitute an accidental injury within the meaning of the workmen's compensation act, or whether he did receive such an injury and that it did constitute an accidental injury but that it did not arise out of and in the course of employment." Accordingly, the order of the Board was vacated for further proceedings and more detailed findings. In the subject case there is no question as to what the Board's ultimate findings were. The Board found that appellant's daily wage earning capacity was \$13.07. The evidentiary facts on which this finding was based were set forth in detail in the decision of the chairman of the Board and the documentary evidence was submitted in toto to

the United States District Court. It thus became a simple question for the District Court on appeal to determine either that the award was based upon substantial evidence that appellant's daily wage earning capacity during the period of his disability did not exceed \$13.07 per day, or that it did not exceed the \$17.20 rate at which he was paid; and there was no ambiguous finding to be resolved by the District Court as in the *DeVore* case.

The decision in the case of *Wimmer v. Hoage*, 90 F.2d 373 (U.S.C.A., D.C.), would appear to state the applicable law when the court said:

"It would have been more satisfactory if the Deputy Commissioner—as we have had occasion to admonish him before—had made specific findings based on the testimony introduced, for precisely that is what the act and regulations contemplate, and, as we think, require him to do. Because ordinarily such findings are necessary to enable us to say whether his award is in accordance with law. But enough appears here to convince us the claim is without merit, and so we think the holding of the Deputy Commissioner that the claimant is not entitled to compensation is clearly right and should be affirmed."

This result would be particularly applicable in the subject situation in view of the provision of the Alaska Workmen's Compensation Act to the effect that "An award by the full board shall be conclusive and binding as to all questions of fact . . ."

Sec. 43-3-22, ACLA 1949.

Many cases hold that a general finding of a compensation tribunal for or against a claimant is, in effect, a finding of each and every fact necessary to support such general finding. *Armstrong v. Industrial Accident Comm.*, 219 Cal. 673, 28 P.2d 672; *Garbowicz v. Industrial Commission*, 373 Ill. 268, 26 N.E. 2d 123; *Newman v. Rice-Stix Dry Goods Co.*, 335 Mo. 572, 73 S.W.2d 264; *Amerada Petroleum Corp. v. White*, 179 Okla. 82, 64 P.2d 660. In any event, it appears clear that appellant is precluded from raising this objection for the first time on appeal to this honorable court when no objection was made either before the Alaska Industrial Board or the United States District Court in regard to any alleged deficiency in the findings of the Board nor were any findings requested by appellant. Also, the findings as made appear adequate and are amply supported by the evidence.

II.

THE EVIDENCE SUPPORTS THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

The Alaska Industrial Board found that appellant's average daily wage earning capacity during the period of disability was \$13.07. While appellant's alleged injury occurred on September 15, 1952, he was able to continue in his highly paid Alaskan employment until that employment terminated on November 24. It is to be noted that the District Court for the

District of Alaska found that his employment terminated on that date. See Finding 2 of the District Court's Findings of Fact and Conclusions of Law, Tr. 10. There is no evidence upon which to base the inference suggested by learned counsel for the appellant to the effect that the employment would have continued had it not been for the injury. The burden of proof in that regard was on the appellant and, in the courts below, this theory was not even suggested as all parties agreed that the job had terminated on November 24. The learned counsel now representing appellant did not participate in the proceedings in the lower courts.

There was no showing made by the applicant as to his earnings during the months of November and December 1951. There was such a breakdown for the year 1952, indicating that from January 1, 1952 to May 15, 1952, while employed in the State of Washington, applicant earned a total of \$2,521.78, being the sum of \$1,215.70 earned from Builders Equipment Rental, Edmonds, Washington, and the sum of \$1,306.08 earned from Campbell-Atherton Co., Arlington, Wash. Taking the total number of days involved from November 1, 1951 to May 15, 1952, being 195 days, and dividing the earnings proved by the applicant, being \$2,521.78, by the figure of 195 days, we arrive at an average daily wage earning capacity of \$12.93 per day. Apparently the Board erroneously used the figure of 193 days being involved in the period and thus came up with the larger average daily wage of \$13.07. This error of course

avored the employee and, since the employer is not objecting thereto, it is submitted that, based on the evidence presented to the Board, it reached a reasonable result.

It was admitted that appellant's usual work was that of a "cat skinner" and it further was established that the going rate for that type of employment in Seattle, Washington, where appellant usually resided and where he resided during the period of time during which he was disabled, was \$17.20 per day. Assuming that he would have had employment during this period of time, which would certainly be a most favorable assumption in the absence of any evidence to that effect from the appellant and in the face of known fact that jobs as cat skimmers are not easy to obtain during the winter months, it is reasonable to assume that he would not have earned more than \$17.20 per day, on which basis he was paid compensation by his employer.

Moreover, an examination of the earning record of the appellant during the year 1952 indicates that his earnings in Alaska totalled \$7,359.24 for a 170 days working period. During the 158 days that he was in the State of Washington prior to November 24, 1952 but during the year 1952, his total earnings were \$2,646.57, an average of \$16.74 per day. It certainly would be unreasonable to assume that during the alleged period of from November 24 to February 15 he would have earned average wages in excess of those earned at his known Washington employment during the balance of the year.

The applicable Alaska statute is Sec. 43-3-1, ACLA 1949, which provides, insofar as pertinent:

“For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages . . .

“The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

A check of workmen's compensation statutes in the forty-eight states and the Territory of Hawaii fails to reveal any provision very closely akin to the Alaska statute quoted above. The wording appears to be closest to that found in the United States Longshoremen's and Harbor Workers' Act, Title 33, U.S.C.A., Sec. 908(h). The Longshore Act, however, deals with fixing a sum representing wage earning capacity to be used for weekly payments in cases of permanent partial disability and temporary partial disability. It does not apply, as does the Alaska Act, to situations involving temporary total disability and, accordingly,

the decisions under this provision of the Longshore Act are not helpful in construing the Alaska Act. Even less relevant is a decision such as the case of *O'Hearne v. Maryland Casualty Co.*, 177 F.2d 979, cited by appellant since it deals with an entirely different statutory basis for ascertaining average daily wages. The whole question in that case was whether compensation should be awarded on the basis of 33 U.S.C.A., Sec. 910(b) or Sec. 910(c), and this in turn depended upon whether there was evidence to the effect that claimant's employment was intermittent and discontinuous. The court quoted from its previous decision in *Baltimore & O. R. Co. v. Clark*, 4 Cir., 59 F.2d 595 at 599, as follows:

“Subdivisions (a) and (b) are applicable only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by three hundred would approximate the average annual earnings. Where the employment is intermittent or discontinuous in its nature, multiplying the average daily wage paid during employment by three hundred would give as annual earnings a sum far in excess of the actual earning power of the employee, and consequently that method of determining average annual earnings cannot reasonably be applied and the method prescribed by section (c) must be followed . . .”

indicating its disapproval of payments based on average of annual earnings where employment is intermittent or discontinuous such as in the subject case.

The United States District Courts in Alaska in two Divisions have given constructions to the provision dealing with temporary disability compensation. The late Judge Anthony Dimond, in a detailed and very well reasoned decision, sets forth the applicable considerations in *Vannev v. Alaska Packers Ass'n*, 12 Alaska Rep. 284. Judge Dimond discussed the seasonality of various employments in Alaska, stating:

“The packing of salmon is a seasonal operation. In the Bristol Bay area, the actual taking of salmon is limited to a period of 30 days. But considerable work must be done in preparation for packing and, at the close of the season, in shipment of the pack. When salmon are plentiful all in the industry work at top speed and for long hours. Compensation is made not only by minimum base rate pay but by overtime and a share or percentage of the pack.”

In discussing the Alaska statutory provision dealing with determination of average daily wage earning capacity, Judge Dimond states:

“It seems evident that the provisions of the law quoted above give to the Board a wide discretion, to be soundly and justly exercised, in fixing the average daily wage earning capacity of the injured employee, and that the discretion is not limited to the wages currently being earned daily by the employee at the time he sustained the injuries. For example, it seems plain that if the petitioner in this case had been unable, by reason of his injury, to perform any work after July 9, the date he sustained the injury, his disability compensation would rightly be calculated upon his full earning capacity for the season in his cur-

rent employment, provided he was disabled for the entire remainder of the season.

“The origin of the above-quoted provisions of our statute (Sec. 43-3-1 ACLA 1949) is not known. The legislative history of the Act discloses no information on the subject.

“Under the law as written it appears to be the duty of the Board, in every such case, to determine the amount of wages or compensation the injured employee is capable of earning *and* of which he is or may be precluded from earning and receiving by reason of his injuries, and base the award on that result. Doubtless, evidence of the current and past wage earnings, including bonuses, percentages of product, and payments for overtime, as well as the commonly established or accepted standards of wages in the industry or occupation in which the injured employee has been engaged or which he may follow for a livelihood, are all factors that may be properly considered by the Board in making an award. But the *ultimate test is, what has the employer lost in wages or compensation by reason of his injuries? That seems to be the standard which the law prescribes, and the standard with which the Board endeavored to comply.*” (Last italics ours.)

The test, as set forth above in Judge Dimond’s decision, appears to be eminently fair and doubtlessly is what the Alaska legislature had in mind when it enacted the provision quoted above in Sec. 43-3-1 ACLA 1949. The purpose of workmen’s compensation legislation is to partially compensate employees for disability resulting from injuries arising out of and

in the course of their employment, with a view toward having the burden of the employee's loss of earnings absorbed by the general public in the price of the product rather than being borne by the employee alone. It was never intended, and, as far as can be ascertained by diligent research, has never been suggested by the most ardent proponents of liberal compensation legislation, that the employee was to make a profit as a result of his injury. If the position of the appellant were to be upheld, it would lead to this patently absurd result. Thus, as in the subject case, an employee could earn over \$1,400 a month while working seasonally in Alaska. During the off-season when the employee resided in one of the states where the cost of living is greatly less than in Alaska, he would be entitled to receive 65% of his average daily wage. In a hypothetical case, it might well be established that the maximum wages which the employee would have been able to have earned in that state had he not been injured amounted to \$200 per month. 65% of his loss of wages due to his injury would thus amount to \$130 a month. If appellant's theory were taken, the employee would receive, during this period of time when the most that he would have earned would have been \$200.00, the sum of \$910 per month based on 65% of his seasonal earnings, or, if the average of seasonal and non-seasonal earnings were taken, the sum of \$520 a month ($\$1,400 \text{ plus } \$200 \text{ divided by } 2 = \$800 \times 65\% = \$520.00$ compensable wage). It further must be recognized that the sums received as workmen's compensation are not taxable under the

federal income tax laws so that they represent substantially larger gross earnings than the amount specified. Certainly it would be an odd result to have a man, while incapacitated, receive substantially more than the earnings he would normally have made while well, under a compensation system whereby his compensation is awarded without regard to any fault of the employer.

The Alaskan situation is probably unique in lending itself to the possibility of such an anomalous situation. It is well recognized that the cost of living in Alaska varies from $33\frac{1}{3}\%$ to more than 50% higher than the equivalent costs in the states. Thus the last report prepared by the Territorial Department of Labor on relative food prices, using the average of stateside prices as 100, indicated that the comparative prices in Alaska varied from 133.12 in Ketchikan to 155.76 in Fairbanks and 156.41 in Kodiak. See Biennial Report, Territorial Department of Labor, 1949-50, page 7. Other cost of living figures indicate substantially higher costs in Alaska in relation to "state-side" costs than the relative food prices quoted above. See Ernest Gruening, *The State of Alaska*, page 426, Random House 1954, indicating costs of living in Alaska were 35.52% to 116.16% higher than average Washington, D. C. costs of living. Wages are extremely high during the seasonal period of employment and vast numbers of workers come to the Territory during the summer months with a view to making their entire annual earnings, or almost their entire annual earnings, during that period of time.

If the Alaska legislature had not made a provision such as that contained in Sec. 43-3-1 cited above, there would be a substantial incentive for employees to stay "disabled".

As Judge Dimond stated in his able opinion:

"Just as no one should be denied a fair award because, by reason of his injury, he may be unable to prove that he would inevitably have had remunerative employment during the period of his actual disability, so also, one temporarily or seasonally employed at wages above the scale which he was earning or is capable of earning during the remainder of the year may not justly claim disability compensation based on those seasonal or temporary wages for a disability arising during such employment which does not really disable the employee until after the temporary or seasonal employment has been carried through to completion without any loss of wages therefor."

Counsel stated that "The injured workman's disability reaches into the future and not the past and that his loss as a result of such disability has an impact only on probable future earnings," citing Larson's Workmen's Compensation Law, Volume 2, page 71, Section 60.11. Larson in that section is discussing installment payments for permanent partial disability; nevertheless, it is conceded that the disability reaches into the future and the loss as a result of the disability affects the earnings during that future period. The question presented in regard to determining average daily wage earning capacity under the Alaska Act is the amount of wages which the

employee could reasonably have been anticipated to have earned during the period of disability had he not been injured. The only logical means of estimating such loss of earnings is based on the past record of employment of the employee in the absence of the employee showing unusual circumstances to indicate that he would have received wages on a different basis during the particular year that his disability resulted. The statement of Judge Dimond in the *Vannev* case in regard to the duty of the applicant to show any such unusual circumstances is equally pertinent to the subject situation. He said:

“The petitioner himself offered no proof as to what he had earned in any preceding year between September 20 and December 31, or of his opportunity, actual or potential, for earnings between September 20 and December 31, 1946. Nor did he offer any proof as to his earnings, daily, weekly or monthly before June 1946. The only evidence on the subject was provided by the defendant's insurer to the effect that the petitioner paid income tax upon gross income of \$2,519.92 received between January 1 and September 15, 1946. This was not disputed. We know from all of the evidence that of his total income during the period mentioned, he earned \$1,463.70 between June 1 and September 15, 1946, and was paid that amount by the defendant Association, thus leaving a balance of \$1,056.22 which he must have earned and received between January 1 and June 1, 1946, a period of five months, which, when broken down, would amount to \$211.24 per month or almost exactly \$7.00 per day. Between June 1, and September 15, 1946, under his sea-

sonal employment by the Association, his earnings averaged \$418.20 per month or \$13.67 per day.

“The only reasonable conclusion at which one may arrive, in the absence of any other evidence on the subject, is that plaintiff’s daily wages between September 20 and December 31, 1946, would probably not have exceeded the average of his earnings between January 1 and June 15, 1946. Accordingly, I find that the average wage earning capacity of the petitioner between September 20 and December 31, 1946, was not in excess of the amount agreed to by the Association’s insurer and approved by the Board of \$233.00 per month, or \$7.76 per day, and the award of the Board of Compensation for so much of that period as falls between October 9 and December 31, 1946, inclusive, is affirmed.

“If the petitioner is entitled to any additional compensation based upon his anticipated or possible earnings between September 20 and December 31, 1946, he has had ample opportunity to so show. He was at all times represented by counsel. No such showing has been made or even suggested.”

The burden is always on the employee to prove his average daily wages in a compensation proceeding. See *City of Connersville v. Adams*, 121 Ind.App. 353, 98 N.E.2d 230, and *Bennett v. Walsh Stevedoring Co.*, 46 So.2d 834, 253 Ala. 685.

As mentioned above, the Alaska Workmen’s Compensation Act specifies that the findings of the Board “shall be conclusive and binding as to all questions of fact.” Sec. 43-3-22 ACLA 1949. The Board in the

subject case has found that Brown's average daily wage during the period of his disability was \$13.07 per day. This was affirmed by the learned judge of the United States District Court for the District of Alaska. The law in regard to appeals from a Board's findings is set forth in Larson's Workmen's Compensation Law, Volume 2, Sec. 80.10, as follows:

“A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has expressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliché of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course.”

It would be superfluous to cite the many cases supporting this well established principle of law. Certainly there is substantial evidence upon which the Alaska Industrial Board and the United States District Court for the District of Alaska determined that Mr. Brown's average daily wage during the period of his disability was not in excess of \$13.07 per day.

In any event, even assuming full employment by Brown during the period of his disability, his average wages would not have exceeded \$17.20 and there was no reason for the Board to assume that Brown

would have been fully employed during this period of time in the absence of a showing to that effect by the appellant.

CONCLUSION.

Adequate findings were made by the Alaska Industrial Board in its Decision and Award and, in any event, appellant is precluded from objecting to any alleged absence of findings in view of the fact that no requests for findings were made before the Board and no objections raised before the Board or the United States District Court or in the statement of points relied upon on appeal.

The finding of the Alaska Industrial Board to the effect that Brown's average daily wage earning capacity during the period of his disability was \$13.07 was amply supported by the evidence and, in the alternative, the evidence clearly indicated that his average daily wage earning capacity during the period of his disability did not exceed \$17.20 per day, the rate at which he was paid by the employer. Accordingly, it is respectfully submitted that the decree of the United States District Court should be affirmed.

Dated, Juneau, Alaska,
March 23, 1955.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
*Attorneys for Appellees Alaska
Aggregate Corporation and Mor-
rell P. Totten & Company, Inc.*

No. 14567

United States
Court of Appeals
for the Ninth Circuit.

JOHN GISKE,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY
CANNERIES, INC., and D. K. MacDONALD
& CO.,

Appellees.

Transcript of Record

Appeal from the District Court
for the District of Alaska,
Division Number One.

FILED

JAN 26 1955

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

JOHN H. DIMOND,

P. O. Box 366,

Juneau, Alaska,

For Appellant.

FAULKNER, BANFIELD & BOOCHEVER, By

R. BOOCHEVER,

P. O. Box 1121,

Juneau, Alaska,

For Appellee, Halferty Canneries, Inc.,
et al.

J. GERALD WILLIAMS,

Attorney General for Alaska,

Juneau, Alaska,

For Appellee, Alaska Industrial
Board.

In the District Court for the District of Alaska,
Division Number One, at Juneau

Civil Action No. 6983-A

JOHN GISKE,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY
CANNERIES, INC., and D. K. MacDONALD
& CO.,

Defendants.

STIPULATION OF FACTS

Be it remembered that the following agreed statement of record on appeal in the entitled cause was filed in the office of Clerk of the District Court for the District of Alaska, First Judicial Division, at Juneau, Alaska, on the 20th day of October, 1954.

Agreed Statement

The relevant facts in this case are these:

1. Plaintiff was employed by defendant, Halferty Canneries, Inc., at Cordova, Alaska, from May 18, 1952, to September 27, 1952, as a net boss in defendant's salmon cannery. In such employment his earnings totalled \$2,292.59, or an average of approximately \$17.63 per day. On September 3, 1952, while in the course of such employment, plaintiff twisted and cut his right leg. He left such employment on September 27, 1952, and was tempo-

rarily disabled by reason of such injury from September 27, 1952, to December 31, 1952.

2. Plaintiff is approximately 68 years old and is a resident of the State of Washington. Since about 1926 he had been employed each year in Alaska during the fishing season by defendant Halferty Canneries, Inc. He was so employed as a fisherman from 1926 to 1945, as a net and webb man in the net loft of defendant's cannery, from 1941 to 1951, and as net boss during the seasons 1951 and 1952. During the "off season," that is, the period of the year outside the regular fishing season in Alaska, he generally undertook employment in Seattle, Washington, repairing nets.

3. Plaintiff's record of earnings and employment for the years 1948 to 1952 is as follows:

(a) During the years 1948 to 1951, plaintiff's earnings during the seven-month "off season" outside of Alaska were as follows: 1948—\$288; 1949—\$648; 1950—\$399.60; 1951—none.

(b) While employed by defendant Halferty Canneries, Inc., at Cordova, Alaska, during the year 1951, he earned a total of \$2,540.00.

(c) While employed by defendant Halferty Canneries, Inc., at Cordova, Alaska, from May 18, 1952, to September 27, 1952, he earned a total of \$2,292.59, or an average of \$17.63 per day.

4. Defendants paid plaintiff, in respect to such injury, pursuant to the provisions of the Alaska Workmen's Compensation Act, the following:

(a) All medical expenses.

(b) The sum of \$90.35 for temporary disability compensation, computed at the rate of \$1.39 per day from September 28, 1952, to November 30, 1952.

5. Defendant's computation of the amount of temporary disability compensation paid (\$90.35) was grounded upon their view that plaintiff's "average daily wage earning capacity," within the meaning of Section 43-3-1 ACLA 1949, was \$1.39 per day—this figure apparently being based upon plaintiff's average earnings outside of Alaska after the end of the fishing season for prior years. Plaintiff was not satisfied with this—his contention being that he ought to have received compensation based upon a higher average wage earning capacity, as measured, for example, by his earnings while working for the defendant, Halferty Canneries, Inc., at the time of injury, or by the average of his yearly earnings while working for such employer in prior years. Hence, on June 22, 1953, plaintiff filed with the Alaska Industrial Board his application for adjustment of claim.

6. This application was heard first by less than the full Industrial Board and on August 13, 1953, the Board Chairman, Henry A. Benson, rendered his decision holding that plaintiff had been temporarily disabled by reason of his injury during the period September 27, 1952, to December 31, 1952, and that his average daily wage earning capacity for that period was \$7.05 per day. Defendants

made application to the full Board for review of this decision, and on January 8, 1954, the full Board set aside Benson's decision of August 13, 1953, and awarded plaintiff temporary disability compensation from September 27, 1952, to December 31, 1952, on the basis of an average wage earning capacity of \$3.88 per day.

7. From this decision of the Board the matter was appealed by plaintiff to the District Court on January 29, 1954, pursuant to the provisions of Section 43-3-22 ACLA 1949; and on July 29, 1954, the District Court, without opinion, entered its findings of fact, conclusions of law and decree affirming the decision of the Alaska Industrial Board of January 8, 1954. Plaintiff filed his notice of appeal from such decree to the United States Court of Appeals for the Ninth Circuit on August 12, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants-Appellees, Alaska Aggregate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,
Attorney General of Alaska;

By /s/ EDMUND A. MERDES,
Assistant Attorney General, Attorney for Defendant-Appellee, Alaska Industrial Board.

Approved: Oct. 23, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed October 20, 1954.

Alaska Industrial Board
Juneau, Alaska
Case No. 2-9-331
Docket No. 217

JOHN GISKE,

Applicant,

vs.

HALFERTY CANNERIES, INC., and/or D. K.
MacDONALD & CO.,

Defendants.

DECISION

This case came on to be heard by the Full Board pursuant to the appeal of defendant from the Board Decision of August 13, 1953, made by Members Henry A. Benson and Neil F. Moore. Applicant was represented by attorney William L. Paul, Jr., and defendant by attorney Robert Boochever of counsel Faulkner, Banfield and Boochever. The Full Board heard argument of counsel and considered the case on the merits.

Decision

The Decision in this matter made on August 13, 1953, is set aside and applicant is awarded compen-

sation for temporary total disability from September 27, 1952, to December 31, 1952, inclusive. The average daily wage earning capacity is hereby fixed at \$3.88.

January 8, 1954.

[Seal] /s/ NEIL F. MOORE,
Member.

/s/ J. GERALD WILLIAMS,
Member.

Certification

I hereby certify the above and foregoing to be a full, true and correct copy of the Decision in the case of John Giske v. Halferty Canneries, Inc., and/or D. K. MacDonald & Co., Case 2-9-331, Docket No. 217.

January 8, 1954.

[Seal] /s/ HENRY A. BENSON.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Matter, coming on to be heard before the court on the complaint and appeal filed by the plaintiff, and the plaintiff having been represented by W. L. Paul, Jr., and John Dimond, and the defendants Halferty Canneries, Inc., and D. K. Mac-

Donald & Co., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, and the attorneys for the plaintiff and defendants having entered into an oral stipulation that the principle involved in this case be governed by this court's decision in the case of *Elmer W. Brown v. Alaska Industrial Board and Alaska Aggregate Corp.*, and *Morrell P. Totten & Company, Inc.*, No. 6981-A, and good cause having been shown, the court makes the following

Findings of Fact

1. That on or about September 3, 1952, John Giske twisted and cut his right leg while employed by the defendant Halferty Canneries, Inc., at Cordova, Alaska.

2. Applicant was paid full wages to the end of the fishing season and was temporarily disabled thereafter from September 27, 1952, to December 31, 1952, inclusive.

3. While employed by Halferty Canneries Inc., plaintiff received wages of \$2,292.59 for the period May 18, 1952, to September 27, 1952.

4. When not employed during the fishing season in Alaska, applicant customarily was employed as a net repairman in Seattle, and his earnings during the off-season for the four years prior to 1952 were

as follows: 1948, \$288.00; 1949, \$648.00; 1950, \$399.60; 1951, none.

5. On the basis of a seven-month off-season, applicant's average monthly wage, based on the three last years during which he worked in the off-season, was \$63.60, and his average daily wage was \$2.12 per day.

6. The Alaska Industrial Board entered its decision and award on January 8, 1954, allowing applicant compensation for the period September 27, 1952, to December 31, 1952, inclusive, based on an average daily wage of \$3.88 per day.

7. The award of the Alaska Industrial Board adequately compensated applicant for loss of earnings sustained by reason of his injury.

8. The defendant employer and insurance company have made no cross appeal for a reduction of the average daily wage basis from \$3.88 to \$2.12 per day.

From the foregoing Findings of Fact, the court makes the following

Conclusions of Law

1. There was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining employee's average daily wage during the period of his disability to be \$3.88.

2. The decision of the Alaska Industrial Board

should be affirmed and defendants should have judgment against the plaintiff for their costs and disbursements, including a reasonable attorney's fee of \$.....

Done in Open Court this 29th day of July, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

Approved as to form:

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 29, 1954.

In the District Court for the District of Alaska,
Division Number One, at Juneau
Civil Action File No. 6983-A

JOHN GISKE,

Plaintiff,

vs.

ALASKA INDUSTRIAL BOARD and HAL-
FERTY CANNERIES, INC., and D. K. Mac-
DONALD & CO.,

Defendants.

DECREE

This Matter, having come on to be heard before the court on the complaint and appeal filed by the

plaintiff, the plaintiff having been represented by W. L. Paul, Jr., and John Dimond, and the defendants Halferty Canneries, Inc., and D. K. MacDonald & Co., having been represented by R. Boochever of Faulkner, Banfield & Boochever, and the Alaska Industrial Board having failed to enter any appearance herein, the attorneys for plaintiff and defendants having entered into an oral stipulation that the principle involved in this case be governed by this court's decision in the case of Elmer W. Brown v. Alaska Industrial Board and Alaska Aggregate Corp., and Morrell P. Totten & Company, Inc., and the court having entered its findings of fact and conclusions of law,

It Is Hereby Ordered, Adjudged and Decreed that the decision of the Alaska Industrial Board dated January 8, 1954, be and the same is hereby affirmed, and defendants are awarded judgment against the plaintiff for their costs and disbursements, including an attorney's fee of \$.

Done in Open Court this 29th day of July, 1954.

/s/ GEORGE W. FOLTA,
District Judge.

Approved as to form:

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

Receipt of Copy acknowledged.

[Endorsed]: Filed July 29, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named plaintiff hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final judgment and decree entered in this action on the 29th day of July, 1954.

Dated August 10, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

[Endorsed]: Filed August 12, 1954.

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents, that we, John Giske, as principal, and Indemnity Insurance Company of North America, a corporation, as surety, are held and firmly bound unto Alaska Industrial Board and Halferty Canneries, Inc., and Pacific Insurance Adjusters, as defendants, in the full and just sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said Alaska Industrial Board and Halferty Canneries, Inc., and Pacific Insurance Adjusters, its successors and assigns, to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 24th day of August, 1954.

Whereas, on July 29, 1954, in an action pending in the District Court of the United States for the Territory of Alaska, 1st Division, between John Giske, as plaintiff, and Alaska Industrial Board and Halferty Canneries, Inc., and Pacific Insurance Adjusters, defendants, an order granting a motion to dismiss was entered against the said John Giske, and the said John Giske having filed in said Court a notice of appeal from such order to the United States Court of Appeals for the Ninth Circuit;

Now, the condition of this obligation is such that if the said John Giske shall prosecute his appeal to effect, and shall pay costs if the appeal is dismissed or the judgment affirmed, or such costs as the said Court of Appeals may award against the said John Giske, if the judgment is modified or in any other event, then this obligation to be void; otherwise to remain in full force and effect.

JOHN GISKE,

By /s/ JOHN H. DIMOND,

Of His Attorney, Principal.

[Seal] INDEMNITY INSURANCE COMPANY
OF NORTH AMERICA,

By /s/ HENRY R. BUCK,

Attorney-in-Fact, Surety.

[Endorsed]: Filed August 26, 1954.

[Title of District Court and Cause.]

STIPULATION

Whereas, notice of appeal to the United States Court of Appeals for the Ninth Circuit in the above cause was filed herein on August 12, 1954, and the time for filing the record on appeal and docketing the appeal will, without extension by order of this court, expire on September 21, 1954;

Now, Therefore, it is stipulated between the attorneys for the respective parties hereto that plaintiff be given up to and including November 1, 1954, to file the record on appeal and docket the same in the United States Court of Appeals for the Ninth Circuit, and that an order to that effect may be entered herein.

Dated at Juneau, Alaska, this 11th day of September, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants, Halferty Canneries, Inc.,
and D. K. MacDonald & Co.

J. GERALD WILLIAMS,
Attorney General of Alaska;

By /s/ J. GERALD WILLIAMS,
Attorney for Defendant,
Alaska Industrial Board.

[Endorsed]: Filed in open Court September 20,
1954.

[Title of District Court and Cause.]

ORDER

Upon consideration of the stipulation, dated September 11, 1954, between the attorneys for the respective parties to this action, it is hereby Ordered:

That the time for filing the record on appeal and docketing the appeal in the United States Court of Appeals for the Ninth Circuit in the above cause is extended to and including November 1, 1954.

Dated at Juneau, Alaska, this 20th day of September, 1954.

/s/ GEORGE W. FOLTA,
District Judge. .

[Endorsed]: Filed in open Court September 20,
1954.

[Title of District Court and Cause.]

STATEMENT OF POINTS TO BE RELIED
UPON BY PLAINTIFF

Plaintiff proposes on his appeal to the United States Court of Appeals in the above cause to rely upon the following points as error:

1. The court erred in holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was \$3.88 per day.

This was error because the evidence clearly showed that plaintiff's "average daily wage earning capacity," within the meaning of the "temporary disability" clause of Section 43-3-1 ACLA 1949, was greater than \$3.88 per day.

2. The court erred in entering its decree in favor of the defendants and in affirming the decision and award of January 8, 1954, of the Alaska Industrial Board, and in giving judgment to defendants against plaintiff for the former's costs and attorneys' fees.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed October 20, 1954.

[Title of District Court and Cause.]

STIPULATION RE PRINTING OF RECORD

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that in printing the record to be used in the appeal of this cause to the United States Court of Appeals for the Ninth Circuit, the title of the court and cause in full shall be omitted from all papers except on the first page of the record, and that there shall be inserted in place of such titles on all papers used as part of such record the words: "title of district court and cause"; and that all endorsement on all papers used as part of such record may be omitted except the clerk's filing marks and admissions of service.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants-Appellees, Alaska Aggre-
gate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,
Attorney General for Alaska;

By /s/ EDWARD A. MERDES,
Attorney for Defendant-Appellee, Alaska
Industrial Board.

[Endorsed]: Filed October 20, 1954.

[Title of District Court and Cause.]

STIPULATION AS TO CONTENTS OF
RECORD ON APPEAL

It is stipulated by and between the parties to the above-entitled cause through their attorneys of record that the transcript of record to be filed in the United States Court of Appeals for the Ninth Circuit, pursuant to an appeal taken in the above cause, shall comprise the following and only the following:

1. The Alaska Industrial Board's award of January 8, 1954.
2. Findings of fact and conclusions of law.
3. Decree.
4. Notice of appeal and cost bond on appeal.
5. Statement of points relied upon by appellant.
6. Stipulation re printing of record.
7. Stipulation and order re extension of time for filing record on appeal.
8. Agreed statement as record on appeal.
9. This stipulation.

Dated: October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Plaintiff-
Appellant.

FAULKNER, BANFIELD &
BOOCHEVER,

By /s/ R. BOOCHEVER,
Attorneys for Defendants-Appellees, Alaska Aggregate Corp., and Morrell P. Totten & Co., Inc.

J. GERALD WILLIAMS,
Attorney General for Alaska.

By /s/ EDWARD A. MERDES,
Attorney for Defendant-Appellee, Alaska Industrial
Board.

[Endorsed]: Filed October 20, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the hereto-attached pleadings are the original pleadings and Orders of the Court filed in the above-entitled cause and are the ones designated by the parties hereto to constitute the record on appeal herein.

In Witness Whereof, I have hereunto set my hand and caused the seal of the above-entitled court to be affixed at Juneau, Alaska, this 27th day of October, 1954.

J. W. LEIVERS,
Clerk of the District Court.

By /s/ P. D. E. McIVER,
Chief Deputy.

[Endorsed]: No. 14567. United States Court of Appeals for the Ninth Circuit. John Giske, Appellant, vs. Alaska Industrial Board, Halferty Canneries, Inc., and D. K. MacDonald & Co., Appellees. Transcript of Record. Appeal from the District Court for the District of Alaska, Division Number One.

Filed October 28, 1954.

/s/PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14567

JOHN GISKE,

Appellant,

vs.

ALASKA INDUSTRIAL BOARD, HALFERTY
CANNERIES, INC., and D. K. MacDONALD
& CO.,

Appellees.

APPELLANT'S STATEMENT OF POINTS
AND DESIGNATION OF PARTS OF REC-
ORD TO BE PRINTED

Appellant above named adopts the "statement of points to be relied upon by plaintiff," filed with the Clerk of the District Court, as his statement of points to be relied upon in the United States Court of Appeals for the Ninth Circuit, and prays that the whole of the record as filed and certified be printed.

Dated October 19, 1954.

/s/ JOHN H. DIMOND,
Attorney for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed November 1, 1954.

No. 14,567

IN THE

United States Court of Appeals
For the Ninth Circuit

JOHN GISKE,

Appellant,

VS.

ALASKA INDUSTRIAL BOARD, HALFERTY
CANNERIES, INC., and D. K. MACDON-
ALD & Co.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLANT.

JOHN H. DIMOND,

Juneau, Alaska,

ROY E. JACKSON,

1207 American Building, Seattle, Washington,

Attorneys for Appellant.

FILED

MAR - 1 1955

PAUL P. O'BRIEN,
CLERK

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No. 14,567

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN GISKE,

Appellant,

VS.

ALASKA INDUSTRIAL BOARD, HALFERTY
CANNERIES, INC., and D. K. MACDON-
ALD & Co.,

Appellees.

Upon Appeal from the District Court for the
District of Alaska, First Division.

BRIEF FOR APPELLANT.

OPINION BELOW.

The District Court did not render an opinion in
this case.

JURISDICTION.

This is an appeal from an award of the Alaska
Industrial Board brought to the District Court under
the provisions of §43-3-22 ACLA 1949. (R. 6.) On
July 29, 1954, the District Court, without opinion,

entered its decree affirming the award of the Board. (R. 11-12.) An appeal from such decree was taken on August 12, 1954, by filing with the District Court notice of appeal. (R. 13.) The jurisdiction of the District Court rests on the Act of June 6, 1900, 31 Stat. 322, as amended, 48 USCA §101; the jurisdiction of this Court on §1291 of the Federal Judicial Code.

STATEMENT.

Appellant adopts as his statement of the case, the Agreed Statement set out in the Record at pages 3-6.

STATUTES INVOLVED.

The pertinent portions of the statutes involved are set out in the Appendix, *infra*.

QUESTIONS PRESENTED.

1. Whether the Alaska Industrial Board, in determining appellant's average daily wage earning capacity, made findings of fact in compliance with the provisions of §43-3-16 ACLA 1949.

2. Whether the facts in this case justify the determination by the Alaska Industrial Board and by the District Court that during the period of appellant's disability his average daily wage earning capacity, within the meaning of the "Temporary Dis-

ability'' section of §43-3-1 ACLA 1949 was \$3.88 per day.

SPECIFICATIONS OF ERROR.

The District Court erred:

1. In not making sufficient findings of fact, in compliance with the provisions of §43-3-16 ACLA 1949, to support its determination that appellant's average daily wage earning capacity during the period of his disability was \$3.88 per day.

2. In holding that there was substantial evidence upon which the Alaska Industrial Board based its decision of January 8, 1954, determining that plaintiff's average daily wage during the period of his disability was \$3.88 per day.

3. In entering its decree in favor of the appellees and in affirming the decision and award of January 8, 1954, of the Alaska Industrial Board, and in giving judgment to appellees against appellant for the former's costs and attorney's fees.

ARGUMENT.

PRELIMINARY CONSIDERATIONS.

These facts are not in dispute: That appellant was injured by accident in the course of his employment with appellee, Halferty Canneries, Inc., on September 3, 1952, and left such employment on September 27,

1952 (R. 3); that at the time of such injury his average daily wage was \$17.63 (R. 3); that by reason of such injury appellant suffered a "temporary disability" within the meaning of the "temporary disability" provision of §43-3-1 ACLA 1949, for the period September 27, 1952 to December 31, 1952 (R. 6, 9); and that he was entitled to temporary disability compensation for that period by virtue of such provision of the statute. What is in dispute is the amount of compensation to which appellant was entitled by reason of such injury, and the answer to this depends upon the proper construction, and application in this case, of that part of the statute above mentioned. This section of temporary disability reads as follows:

“[Temporary disability.] For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

“Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

“The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

Prior to the Alaska Industrial Board's award of January 8, 1954, appellees had paid appellant temporary disability compensation at the rate of 65% of \$2.12, or, \$1.39 per day. This constituted appellees' determination of appellant's "average daily wage earning capacity", and presumably, this was based upon the average of appellant's earnings for past years outside of the Territory of Alaska at the end of the Territorial fishing seasons. (R. 9-10.)

When this matter was referred to and heard by the Board Chairman, pursuant to the provisions of §43-3-15 ACLA 1949, an award for temporary disability compensation was made based upon an average wage earning capacity of \$7.05 per day (R. 5); and upon application for review by the full Board, under the provisions of §43-3-16 ACLA 1949, this decision of the Chairman was set aside, and a determination was made that appellant's average earnings capacity

during the period of his disability was \$3.88 per day (R. 6), and this determination was affirmed by the District Court (R. 11-12). Hence, in summary: appellees' determination of appellant's average daily wage earning capacity during the period of his disability was \$2.12; that of the Industrial Board Chairman, \$7.05; and that of the full Board and the District Court, \$3.88.

It is appellant's position that none of these figures are correct; that his average earning capacity should have been computed on the basis of his earnings with appellee, Halferty Canneries, Inc., at the time of his injury.

I. IT WAS REVERSIBLE ERROR TO HAVE NOT MADE FINDINGS OF FACT IN COMPLIANCE WITH THE PROVISIONS OF §43-3-16 ACLA 1949.

Although the Board did not say so, it presumably can be implied from its finding that appellant's wage earning capacity was \$3.88 per day (R. 8), the initial determination that appellant's actual earnings, at the time of his injury, did not "fairly and reasonably represent his daily wage earning capacity". §43-3-1 "Temporary Disability". This being the case, it was then the duty of the Board to fix such earning capacity after having "due regard" to each of the following:

1. The nature of the injury.
2. The degree of temporary impairment.
3. Appellant's usual employment.

4. Any other factor or circumstance in the case which may have affected his capacity to earn wages in his temporarily disabled condition.

It is impossible to tell from the record in this case, because of the simple conclusion that appellant's earning capacity was \$3.88 per day (R. 8), what the above factors had to do with this determination of earning capacity. In fact, the Board's findings were so lacking in particularity, that it is safe to assume that no regard at all was had to those items specified in the statute.

What, then, the Board has done is to make an award of \$3.88 per day for a certain period, but it has failed to accompany this with the "findings of fact upon which it is based * * *", §43-3-16 ACLA 1949. Such findings, it would seem, should be obligatory. If the law were otherwise, there would be nothing to prevent a Board, in respect to temporary compensation awards, from making an arbitrary choice of some figure supposedly representing one's average wage earning capacity—a figure which would bear no logical relation to the injured person's actual earning capacity during the period of his disability, his "usual earnings", the nature of his injury, or the degree of temporary impairment—and base an award on that figure. The whole purpose and intent of the Workmen's Compensation Law—to fairly compensate one for loss of earnings during the period of his disability—would thus be frustrated, and sanction of the Board's action in this respect would be given by the Courts if the latter would hold, upon review of the

Board's decision on any such case, that it thus sufficiently complied with the provisions of law requiring findings of fact upon which an award is based.

That is precisely the case here. There is no conceivable way to determine from the Board's decision and award of January 8, 1954, what relation, if any, the figure of \$3.88 per day bears to appellant's usual earnings, the nature of his injury, or the degree of his temporary impairment. The failure of the Board, and the District Court, to indicate in any degree the basis for the award made and the determination that appellant's earning capacity was \$3.88 per day, constitutes a failure to comply with the provisions of §43-3-16 ACLA 1949, and has made it impossible for this reviewing Court to determine whether there was any substantial evidence in the Record which would support this determination. This, it is submitted, was error, and sufficient reason for reversing the decision of the District Court. See *DeVore v. Maidt Plastering Co.*, 205 Okla. 610, 239 P. 2d 520; *Fireman's Fund Ins. Co. v. Peterson*, CA-9, 120 F. 2d 547, 548; *Howard v. Monahan*, 33 F. 2d 220.

II. THE EVIDENCE DOES NOT SUPPORT THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

Even if it could be held that the Board's decision that appellant's daily average wage earning capacity was \$3.88 was a "finding" in sufficient compliance with §43-3-16 ACLA 1949 (which appellant does not

admit), still, there is no substantial evidence in the Record to support this determination. Rather, the evidence clearly supports the fact that appellant's earning capacity was considerably more than the amount determined by the Board and the District Court.

The Alaska statute on this subject, §43-3-1 "Temporary Disability", measures one's earning capacity under two situations: (1) by his actual earnings at the time of injury, "... if such actual earnings fairly and reasonably represent his daily wage earning capacity", and (2) if such earnings do not fairly represent such capacity, then by what does constitute "reasonable" wage earning capacity, "having due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition."

The law, however, is silent on the subject of exactly when one's actual earnings do represent his average earning capacity, and when not, and, if not, what they amount to; in other words, there is an absence of any precise formula by which those determinations can be made. In such a situation it is necessary to consider the real objective of wage calculation, which is to arrive at a fair approximation of the injured employee's future earning capacity, and not to be influenced by the thought that a compensation theory is necessarily satisfied when a mechanical representation of the claimant's earnings in some arbitrary past

period is used as a wage basis. It must be remembered at all times that an injured workman's disability reaches into the future, and not the past, and that his loss as a result of such disability has an impact only on probable future earnings. See Larson, *Workmen's Compensation Law*, Vol. 2, page 71, §60.11; *St. Paul-Mercury Indemnity Co. v. Idov*, 88 Ga. 697, 77 SE 2d 327, 329.

With this in mind, it would be reasonable then to give this construction to the statute:

1. Actual earnings at the time of injury should be used as the basis for temporary compensation, where the type of employment engaged in by the workman at the time of injury is of a regular, permanent and steady character.

2. Where the employment is discontinuous or irregular, actual earnings cannot be used; in such case, the average wage earning capacity would have to be determined with consideration given to a history of the employee's earnings in other employment, together with his "capacity", that is, his fitness, willingness and readiness to work, considered in connection with opportunity to work.

Thus, giving proper consideration to the realities of temporary total disability, and the objectives of the law on this subject, it would be perfectly proper and logical to so interpret the temporary disability section of the Alaska statute, and under such construction, particularly under "1", supra, the evidence in this case clearly shows that the Board's figure of \$3.88 per day, as appellant's average daily wage earn-

ing capacity, was far below that amount which, in reality, represented his loss of earnings during such period of disability.

Actual earnings at the time of injury would, it would seem, be the only just consideration in a case of this kind. And this is because the record of appellant's work with appellee, Halferty Canneries, Inc., shows beyond dispute that this was employment of a regular, permanent and steady character, such as to justify the application of construction (1), *supra*, of the Alaska law on temporary disability. The Record shows that for every year since 1926 appellant has worked during the fishing seasons in Alaska for this corporation—as a fisherman from 1926 to 1945, as a net and web man to 1951, and as a net boss for the 1951 and 1952 seasons—a total of 26 years. It is extremely difficult to understand how such employment, in the course of which appellant was injured, could be called anything but permanent and regular. To think of it as anything but a regular and steady type of employment, which will justify disability compensation based upon actual earnings at the time of injury, would be to completely ignore the realities in this case.

Implicit in appellees' computation of the amount of compensation due, which was based upon appellant's average earnings outside of Alaska for the years 1948 to 1951 (R. 4-5), is the argument that regardless of the number of years this man had worked for his employer, and the steadiness and regularity of such employment, the earnings of such employ-

ment could never be used as a basis for temporary compensation because this work is what is termed "seasonal", that is, although it occurs regularly, year after year, it exists each year for a period less than the entire twelve months of such year.

Such an argument is completely unfair and defeats the objectives of workmen's compensation laws. It would mean, if it were consistently applied, that one, like appellant, who was employed each year in Alaska from June to November, would have to have different rates and periods of compensation, depending upon when he was injured and how long his disability lasted. For example, if he ordinarily left his seasonal employment on November 1 of each year, and was disabled from September 1 to December 31, then he would receive compensation based on actual earnings at the time of injury from September 1 to November 1, and compensation based upon some other figure, from November 1 to December 31. Many instances can be conceived where even more complicated determinations would have to be made and confusion multiplied.

Certainly, this could not have been intended by the Legislature when it enacted the statute. It must have been intended that some definite and certain determination could be readily made by which an injured employee would be fairly and justly compensated for his loss of earning capacity for the period that he was disabled. And such confusion and uncertainty can be avoided if, in a case of the kind here, the appellant's earning "capacity" is determined to be that which

appellant, by long years of steady and regular work with the same employer, has exhibited it to be, and that which appellee, by having employed appellant for those long years, has admitted it to be, that is, his actual average earnings at the time of his injury. To hold otherwise would necessitate the utilization of presumptions and unknown factors that would be totally unjustified. Why, for example, must it be presumed in this case that appellant left his employment on September 27, 1952, for any reason other than the injury which occurred in the course of such employment, and that had it not been for such injury, he would have continued to earn his average of \$17.63 a day until the end of his period of disability, November 30, 1952; or, why is it to be presumed that even outside of such seasonal employment he would not, except for such injury, have earned considerably more between September 27, 1952, and November 30, 1952, than he had earned as an average between those periods of time in former years, because of factors such as appellant's age, his health, and other needs?

Appellees' entire argument, as in a companion case (*Brown v. Alaska Aggregate, et al.*, No. 14,566) is based upon hypotheses, totally unsupported by facts—a fallacious argument which says that compensation theory is satisfied if a mechanical representation of one's earnings in some arbitrary past period is used as a wage basis. See Larson, *Workmen's Compensation Law*, Vol. 2, p. 71, §60.11. This is not, it is submitted, what the Alaska statute has contemplated at all. Appellant's employment with Halferty Canneries,

Inc. was as regular, steady and continuous as any employment could be, and because of that, the only fair compensation for his injury and the measure of his earning capacity, would be the wages that he was earning at the time of such injury. Cf. *St. Paul-Mercury Indemnity Co. v. Idov*, 88 Ga. 697, 77 SE 2d 327, 329; *O'Hearne v. Md. Casualty Co.*, CA-4, 177 F. 2d 979.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Juneau, Alaska,
February 23, 1955.

JOHN H. DIMOND,
ROY E. JACKSON,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

§43-3-1 [*Temporary Disability.*] ACLA 1949

“For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages. And in all cases where the injury develops or proves to be such as to entitle the employee to compensation under some provision in this schedule, relating to cases other than temporary disability, the amount so paid or due him shall be in addition to the amount to which he shall be entitled under such provision in this schedule.

“Payment for such temporary disability shall be made at the time compensation is customarily paid for labor performed or services rendered at the plant or establishment of the employer liable therefor and not less than once a month in any event.

“The average daily wage earning capacity of an injured employee in case of temporary disability shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

§43-3-16 ACLA 1949

“Review by full Board: Application: Time for: Award: Filing: Copies. If an application for review is made to the Industrial Board within ten days from the date of an award, made by less than all the members, the full Board, if the first hearing was not held before the full Board, shall review the evidence, or, if deemed advisable, hear the parties at issue and their representatives and witnesses as soon as practicable, and shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.”

No. 14,567
United States Court of Appeals
For the Ninth Circuit

JOHN GISKE,

Appellant,

VS.

ALASKA INDUSTRIAL BOARD, HALFERTY
CANNERIES, INC., and D. K. MACDON-
ALD & Co.,

Appellees.

Appeal from the District Court for the
Territory of Alaska, First Division.

BRIEF OF APPELLEES
HALFERTY CANNERIES, INC., AND
D. K. MacDONALD & CO.

FAULKNER, BANFIELD & BOOCHEVER,

Box 1121, Juneau, Alaska.

Attorneys for Appellees

Halferty Canneries, Inc.

and D. K. MacDonald & Co.

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No. 14,567

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ALD & Co.,

Appellees.

Appeal from the District Court for the
Territory of Alaska, First Division.

BRIEF OF APPELLEES HALFERTY CANNERIES, INC., AND D. K. MacDONALD & CO.

FACTS.

John Giske was employed by Halferty Canneries, Inc., at Cordova, Alaska, from May 18, 1952, to September 27, 1952, as a net boss in defendant's salmon cannery. He cut his leg on September 3, 1952, but was able to continue with his employment until September 27, the end of the fishing season. He was temporarily disabled from that date until December 31, 1952.

During the period of his employment Giske earned \$2,292.59, or an average of \$17.63 per day. For many

years past he had worked during the summer fishing season in Alaska. He is and was a resident of Seattle, Washington, and during the period of the year when he was not employed in Alaska, which would be approximately seven months each year, he did some work repairing nets in Seattle, Washington.

His total earnings during this "off season" for the four years prior to his injury were as follows: 1948, \$288.00; 1949, \$648.00; 1950, \$399.60; and 1951, none. Thus his average "off season" wages according to the evidence were \$333.90; or, if the year during which he made no earnings is deleted, \$445.20. Since the fishing season normally is of less than five months duration, the off season is a minimum period of seven months. Giske's average monthly wage during the previous four years was \$47.70 and his daily wage during the past four years for that period of time was approximately \$1.59. When the three years in which earnings were derived are considered alone, his monthly average wage was \$63.60 and his average daily wage \$2.12.

Mr. Giske was paid compensation for his disability during this off season on the basis of an average daily wage of \$2.12, the Alaska Workmen's Compensation Act requiring payment at the rate of 65% of the employee's average daily wage. He filed an Application for Adjustment of Claim with the Alaska Industrial Board contending that he was entitled to compensation based on his average earnings for the year prior to his injury rather than on his earnings during the off season.

The case was first heard before Mr. Henry Benson, Chairman of the Board, who filed a detailed decision setting forth substantially the facts as outlined above and concluding that Giske was entitled to compensation at the rate of \$7.05 per day based on an average of his annual earnings.

A rehearing was held before the full membership of the Alaska Industrial Board which reversed this decision, holding that Giske's average daily wage earning capacity during the period of his temporary disability was \$3.88 per day, which figure was obviously based on the average daily wages of Mr. Giske during 1949, the year during which his "off season" wages were most substantial.

From this decision the employee appealed to the United States District Court for the District of Alaska, contending that his average daily wage should be \$7.38 based on his yearly earnings.

The learned judge of the United States District Court affirmed the award of the full membership of the Alaska Industrial Board finding that Giske's daily wage earning capacity during his period of disability was \$2.12 being less than the amount found by the board, but in view of the fact that the employer had not appealed, the court upheld the decision of the Alaska Industrial Board to the effect that the employee's average daily wage during the period of his disability was \$3.88.

From this decision Mr. Giske has appealed. At no time in the proceedings before the Alaska Industrial

Board of the United States District Court did counsel for Giske make any objection in regard to any absence of Findings of Fact or of any specific findings.

ARGUMENT.

I.

APPELLANT IS PRECLUDED FROM ATTACKING THE DECISIONS BELOW IN REGARD TO ANY ALLEGED DEFICIENCY OF THE FINDINGS OF FACT SINCE APPELLANT MADE NO OBJECTION IN THAT REGARD BEFORE THE ALASKA INDUSTRIAL BOARD OR THE UNITED STATES DISTRICT COURT, OR IN HIS STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL.

Appellant contends that there was a failure to make findings of fact as required by Sec. 43-3-16, A.C.L.A. 1949. This section specifies:

“If an application for review is made to the Industrial board * * * the full board * * * shall make an award and file the same with the findings of fact on which it is based, and shall send a copy thereof to each of the parties forthwith.”

In the subject case, hearing was first had before Mr. Benson, chairman of the board. Mr. Benson gave a written decision including findings of fact, which findings of fact specified as follows:

“John J. Giske, a 68 year old male, while employed as a net boss by Halferty Canneries, Inc., at Cordova, Alaska, on September 3, 1952, suffered an accidental injury resulting in temporary disability from a fall in which his right leg was twisted and cut between the ankle and knee. Tem-

porary disability continued from September 27, 1952, to January 1, 1953. Applicant's regular employment was that of net boss or web foreman. In this capacity his total earnings during the year 1951, the year previous to the accident, amounted to \$2,540, all of which earnings were received from Halferty Canneries Inc. In 1952, for the period January 1 to September 27, his earnings were \$2,292.59. Photostatic copies of the withholding statements for the years 1948, 1949 and 1950 show that Giske customarily had additional earnings while employed by marine supply firms in Seattle. These earnings range from \$288 in 1948, \$648 in 1949 and \$399.60 in 1950. There were no such additional earnings in 1951. There is no showing either that Giske would or would not have had additional earnings except for his disability due to the injury and, accordingly, the Board assumes that his actual 1951 earnings fairly and reasonably represent his wage earning capacity in view of his age, disability and most recent work pattern. This average daily wage earning capacity is computed by dividing \$2,540 by 360."

The matter was then reviewed by the full membership of the Alaska Industrial Board, which, in effect, affirmed the specific findings made by the chairman but set aside the decision based on the finding of daily wage earning capacity holding:

"The Decision in this matter made on August 13, 1953 is set aside and applicant is awarded compensation for temporary total disability from September 27, 1952 to December 31, 1952, inclusive. The average daily wage earning capacity is hereby fixed at \$3.88."

No objection was made by counsel for appellant in regard to any failure of the full board to repeat the detailed findings of fact set forth in the chairman's original decision.

The appellant then filed his appeal with the United States District Court, which complaint and appeal merely alleged, insofar as is material here: "Said decision was erroneous as a matter of law in that the average daily wage earning capacity of plaintiff on a yearly basis was \$7.38 daily instead of \$3.88 daily." No mention was made of any failure to file findings of fact or specific findings of fact, and no argument to that effect was made before the United States District Court.

In designating the points relied upon for appeal to this honorable court, learned counsel for appellant made no mention of any deficiency in Alaska Industrial Board decisions or the District Court decree in regard to failure of the board to make specific findings of fact.

As a result of the failure to include this objection in the statement of points relied upon, appellees deemed it unnecessary to include in the record the original decision of Henry Benson, Chairman of the Alaska Industrial Board, which decision set forth the detailed statement of facts as indicated above and which statement of facts further was in effect adopted by the full board with the exception of the ultimate fact pertaining to the amount of the average daily wage earning capacity of the appellant. Moreover, due to appellant's failure to set forth this objection in the statement of

points relied upon, it was not deemed necessary to include appellant's complaint and appeal to the United States District Court which also made no mention of any alleged deficiency in regard to the findings of the Alaska Industrial Board.

In the case of *Western Nat. Ins. Co. v. LeClare*, 163 F. 2d 337, this honorable court stated:

“Three points argued by appellant were that the evidence is neither clear nor convincing; that it does not show Raymond's authority to enter into an oral contract for or on behalf of appellant; and that it does not show Mr. LeClare's authority to act for or on behalf of appellee. These points were not stated in appellant's statement of points and hence need not be considered by us.”

The general rule as pertains to objections to findings of fact is set forth in 4 C.J.S., Sec. 310, as follows:

“As a rule, only objections to the findings of fact or conclusions of law, or to the want thereof, which have properly been brought to the attention of the trial court will be considered on appeal, unless no opportunity was given to present the question. Accordingly, it cannot be objected for the first time on appeal that the findings are indefinite or incomplete, informal, or not sufficiently specific * * *”

In the case of *Northwestern Steamship Co. v. Cochran*, 191 F. 146, it was stated:

“The defense that the plaintiff was not the real party in interest was not made in the pleadings, nor was it suggested in the court below. The objection ‘that plaintiff is not the real party in in-

terest, and hence has no right to sue, comes too late when made for the first time in the appellate court.' ”

This case involved an appeal from the United States District Court for the District of Alaska, Second Judicial Division.

This same, well established rule was enunciated by this learned court in the case of *DeJohn et al. v. Alaska Matanuska Coal Co. et al., Agostino v. Same*, 41 F. 2d 612, wherein the court stated:

“There is some contention here by Agostino that he is entitled to the funds, or a part of the funds, in the receiver’s hands, but that question was not properly in issue in the trial court, was not there decided, and hence is not before us.”

The *DeJohn* case is another case which was taken on appeal from a decision of the United States District Court for the District of Alaska.

These cases would certainly appear to be controlling as pertains to the objection now raised by appellant to the findings of fact since no objection was made in that regard either before the Alaska Industrial Board or the United States District Court. Certainly the United States District Court should have been given the opportunity to rule on this question had appellant desired to raise this issue and, furthermore, objections should have been taken before the Alaska Industrial Board as well.

The general requirements as to the necessary procedural steps to be taken before a question may be

raised on appeal apply to workmen's compensation questions as well as to other matters. Thus it is stated in 146 A.L.R. 125:

"Of course, a party who wants to attack a compensation award for lack of requisite express findings may be required to take appropriate procedural steps, such as seasonably to request the administrative tribunal to make certain findings of fact. And he may waive the deficiency in the award." See *Ruud v. Minneapolis Street R. Co.*, 202 Minn. 480, 279 N.W. 224; *State ex rel. Probst v. Haid*, 333 Mo. 390, 62 S.W. 2d 869; *Chicago & E. R. Co. v. Kaufman*, 78 Ind. App. 474, 133 N.E. 399.

In a similar situation involving alleged deficiencies in the findings of an administrative tribunal, the Eighth Circuit Court of Appeals stated:

"We decline to consider this assignment of error for the reason that it appears from the transcript of record that no such question as that presented by the assignment ever was submitted either to the referee in bankruptcy or to the District Court. The only question passed on by the referee and the District Court and the only question submitted to them was whether the conditional sales contract involved in the case was lawfully acknowledged. There is no support anywhere in the transcript of record for the allegations of fact set out in this assignment of error, that the petition in involuntary bankruptcy and the schedules were filed on the same day and that the schedules did include acknowledgment of the existence of the conditional sales contract, and that it was a

valid lien on the farm tractor.” See *In re Elliott*, 72 F. 2d 300 at 303.

Not only is the appellant precluded from objecting to the findings made by the Alaska Industrial Board, but it is apparent that adequate findings were made. The findings of the Commissioner contained all of the specific facts upon which the ultimate award was based. These findings in effect were adopted by the full board with the exception of the change in regard to the ultimate fact pertaining to average wage earning capacity.

The cases cited by appellant for the most part do not appear to be relevant. Thus the case of *Howard v. Monahan*, 33 F. 2d 220, involved a case where no findings whatsoever had been entered by a Deputy Commissioner, although specifically instructed to make findings by the Compensation Commission.

In *Fireman's Fund Ins. Co. v. Peterson*, 120 F. 2d 547, 548, cited by appellant at page 8 of his brief, the only question was whether the decision of the Commissioner was in accordance with the law and findings were not involved.

In the case of *DeVore v. Maidt Plastering Co.*, 205 Okla. 610, 239 P. 2d 520, the findings failed to indicate on what theory the Commissioner had proceeded since they did not indicate whether the claimant “did not sustain an injury resulting in a strain to his back or whether it intended to find that he did receive such an injury, but that such injury did not constitute an accidental injury within the meaning of the workmen’s

compensation act, or whether he did receive such an injury and that it did constitute an accidental injury but that it did not arise out of and in the course of employment." Accordingly, the order of the board was vacated for further proceedings and more detailed findings. In the subject case there is no question as to what the board's ultimate findings were. The board found that appellant's daily wage earning capacity was \$3.88. The evidentiary facts on which this finding was based were set forth in detail in the decision of the chairman of the board and the documentary evidence was submitted *in toto* to the United States District Court. It thus became a simple question for the District Court on appeal to determine that the award was based upon substantial evidence that appellant's daily wage earning capacity during the period of his disability did not exceed \$3.88 per day, and there was no ambiguous finding to be resolved by the District Court as in the *DeVore* case.

If the findings are deemed to be limited to the findings of the full board, the decision in the case of *Wimmer v. Hoage*, 90 F. 2d 373 (U.S.C.A., D.C.), would appear to state the applicable law when the court said:

"It would have been more satisfactory if the Deputy Commissioner—as we have had occasion to admonish him before—had made specific findings based on the testimony introduced, for precisely that is what the act and regulations contemplate, and, as we think, require him to do. Because ordinarily such findings are necessary to enable us to say whether his award is in accordance

with law. But enough appears here to convince us the claim is without merit, and so we think the holding of the Deputy Commissioner that the claimant is not entitled to compensation is clearly right and should be affirmed."

This result would be particularly applicable in the subject situation in view of the provision of the Alaska Workmen's Compensation Act to the effect that "An award by the full board shall be conclusive and binding as to all questions of fact * * *" Sec. 43-3-22, A.C.L.A. 1949.

Many cases hold that a general finding of a compensation tribunal for or against a claimant is, in effect, a finding of each and every fact necessary to support such general finding. *Armstrong v. Industrial Accident Comm.*, 219 Cal. 673, 28 P. 2d 672; *Garbowicz v. Industrial Commission*, 373 Ill. 268, 26 N.E. 2d 123; *Newman v. Rice-Stix Dry Goods Co.*, 335 Mo. 572, 73 S.W. 2d 264; *Amerada Petroleum Corp. v. White*, 179 Okla. 82, 64 P. 2d 660. In any event, it appears clear that appellant is precluded from raising this objection for the first time on appeal to this honorable court when no objection was made either before the Alaska Industrial Board or the United States District Court in regard to any alleged deficiency in the findings of the board nor were any findings requested by appellant. Also, the findings as made appear adequate and are amply supported by the evidence.

II.

THE EVIDENCE SUPPORTS THE BOARD'S DETERMINATION, AFFIRMED BY THE DISTRICT COURT, OF APPELLANT'S AVERAGE DAILY WAGE EARNING CAPACITY.

The Alaska Industrial Board found that appellant's average daily wage earning capacity during the period of disability was \$3.88. It is conceded that appellant's work in Alaska in the fishing industry was seasonal. Thus his employment had commenced on May 18, 1952 and terminated at the end of the fishing season on September 27, 1952. Apparently this was his customary pattern of employment and the balance of the year he spent at his home in the State of Washington. During this balance of the year, being a minimum of seven months each year, he customarily made but very small earnings, ranging for the four years prior to his injury from a minimum of no earnings in 1951 to a maximum of \$648.00 in 1949.

The extent of the fishing season is well known in Alaska and the Alaska Industrial Board took judicial notice of the fact that it terminated on September 27, 1952, the last date of Mr. Giske's employment, and this also was set forth in Judge Folta's findings of fact (see Finding 2, page 9, Tr.).

The applicable Alaska statute is Sec. 43-3-1, A.C.L.A. 1949, which provides, insofar as pertinent:

“For all injuries causing temporary disability, the employer shall pay to the employee, during the period of such disability, sixty-five per centum (65%) of his daily average wages * * *

“The average daily wage earning capacity of an injured employee in case of temporary disability

shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his daily wage earning capacity. If such earnings do not fairly and reasonably represent his daily wage earning capacity, the Industrial Board shall fix such daily wage earning capacity as shall be reasonable and have a due regard for the nature of his injury, the degree of temporary impairment, his usual employment and any other factor or circumstance in the case which may affect his capacity to earn wages in his temporary disabled condition.”

A check of workmen's compensation statutes in the forty-eight states and the Territory of Hawaii fail to reveal any provision very closely akin to the Alaska statute quoted above. The wording appears to be closest to that found in the United States Longshoremen's and Harbor Workers' Act, Title 33, U.S.C.A., Sec. 908(h). The Longshore Act, however, deals with fixing a sum representing wage earning capacity to be used for weekly payments in cases of permanent partial disability and temporary partial disability. It does not apply, as does the Alaska Act, to situations involving temporary total disability and, accordingly, the decisions under this provision of the Longshore Act are not helpful in construing the Alaska Act. Even less relevant is a decision such as the case of *O'Hearne v. Maryland Casualty Co.*, 177 F. 2d 979, cited by appellant since it deals with an entirely different statutory basis for ascertaining average daily wages. The whole question in that case was whether compensation should

be awarded on the basis of 33 U.S.C.A., Sec. 910(b) or Sec. 910(c), and this in turn depended upon whether there was evidence to the effect that claimant's employment was intermittent and discontinuous. The court quoted from its previous decision in *Baltimore & O. R. Co. v. Clark*, 4 Cir., 59 F. 2d 595 at 599, as follows:

"Subdivisions (a) and (b) are applicable only where the employment is of a continuous nature; for it is only in such cases that the multiplication of the average daily wage by three hundred would approximate the average annual earnings. Where the employment is intermittent or discontinuous in its nature, multiplying the average daily wage paid during employment by three hundred would give as annual earnings a sum far in excess of the actual earning power of the employee, and consequently that method of determining average annual earnings cannot reasonably be applied and the method prescribed by section (c) must be followed * * *"

indicating its disapproval of payments based on average of annual earnings where employment is intermittent or discontinuous such as in the subject case.

The United States District Courts in Alaska in two Divisions have given constructions to the provision dealing with temporary disability compensation. The late Judge Anthony Dimond, in a detailed and very well reasoned decision, sets forth the applicable considerations in *Vannev v. Alaska Packers Ass'n*, 12 Alaska Rep. 284. Judge Dimond discussed the seasonality of various employments in Alaska, stating:

“The packing of salmon is a seasonal operation. In the Bristol Bay area, the actual taking of salmon is limited to a period of 30 days. But considerable work must be done in preparation for packing and, at the close of the season, in shipment of the pack. When salmon are plentiful all in the industry work at top speed and for long hours. Compensation is made not only by minimum base rate pay but by overtime and a share or percentage of the pack.”

In discussing the Alaska statutory provision dealing with determination of average daily wage earning capacity, Judge Dimond states:

“It seems evident that the provisions of the law quoted above give to the Board a wide discretion, to be soundly and justly exercised, in fixing the average daily wage earning capacity of the injured employee, and that the discretion is not limited to the wages currently being earned daily by the employee at the time he sustained the injuries. For example, it seems plain that if the petitioner in this case had been unable, by reason of his injury, to perform any work after July 9, the date he sustained the injury, his disability compensation would rightly be calculated upon his full earning capacity for the season in his current employment, provided he was disabled for the entire remainder of the season.

“The origin of the above-quoted provisions of our statute (Sec. 43-3-1 ACLA 1949) is not known. The legislative history of the Act discloses no information on the subject.

“Under the law as written it appears to be the duty of the Board, in every such case, to deter-

mine the amount of wages or compensation the injured employee is capable of earning *and* of which he is or may be precluded from earning and receiving by reason of his injuries, and base the award on that result. Doubtless, evidence of the current and past wage earnings, including bonuses, percentages of product, and payments for overtime, as well as the commonly established or accepted standards of wages in the industry or occupation in which the injured employee has been engaged or which he may follow for a livelihood, are all factors that may be properly considered by the Board in making an award. *But the ultimate test is, what has the employee lost in wages or compensation by reason of his injuries? That seems to be the standard which the law prescribes, and the standard with which the Board endeavored to comply.*" (Last italics ours).

The test, as set forth above in Judge Dimond's decision, appears to be eminently fair and doubtlessly is what the Alaska legislature had in mind when it enacted the provision quoted above in Sec. 43-3-1 A.C.L.A. 1949. The purpose of workmen's compensation legislation is to partially compensate employees for disability resulting from injuries arising out of and in the course of their employment, with a view toward having the burden of the employee's loss of earnings absorbed by the general public in the price of the product rather than being borne by the employee alone. It was never intended, and, as far as can be ascertained by diligent research, has never been suggested by the most ardent proponents of liberal compensation legislation, that the employee was to

make a profit as a result of his injury. If the position of the appellant were to be upheld, it would lead to this patently absurd result. Thus, as is not at all uncommon, an employee could earn \$1,000 a month while working seasonally in Alaska. During the off-season when the employee resided in one of the states where the cost of living is greatly less than in Alaska, he would be entitled to receive 65% of his average daily wage. It could be well established that the maximum wages which the employee would have been able to have earned in that state had he not been injured amounted to \$200 per month. 65% of his loss of wages due to his injury would thus amount to \$130 per month. If appellant's theory were taken, the employee would receive, during this period of time when the most he would have earned would have been \$200.00, the sum of \$650 per month based on 65% of his seasonal earnings, or, if the average of seasonal and non-seasonal earnings were taken, the sum of \$390.00 a month ($\$1,000$ plus $\$200$ divided by 2 = $\$600 \times 65\% = \390 compensable wage). It further must be recognized that the sums received as workmen's compensation are not taxable under the federal income tax laws so that they represent substantially larger gross earnings than the amount specified. Certainly it would be an odd result to have a man receive substantially more than the earnings he would normally make while incapacitated under a compensation system whereby his compensation is awarded without regard to any fault of the employer.

The Alaskan situation is probably unique in lending itself to the possibility of such an anomalous situation.

It is well recognized that the cost of living in Alaska varies from 33 $\frac{1}{3}$ % to more than 50% higher than the equivalent costs in the states. Thus the last report prepared by the Territorial Department of Labor on relative food prices, using the average of stateside prices as 100, indicated that the comparative prices in Alaska varied from 133.12 in Ketchikan to 155.76 in Fairbanks and 156.41 in Kodiak. See Biennial Report, Territorial Department of Labor, 1949-50, page 7. Wages are extremely high during the seasonal periods of employment and vast numbers of workers come to the Territory during the summer months with a view to making their entire annual earnings, or almost their entire annual earnings, during that period of time. If the Alaska legislature had not made a provision such as that contained in Sec. 43-3-1 cited above, there would be a substantial incentive for employees to stay "disabled".

As Judge Dimond stated in his able opinion:

"Just as no one should be denied a fair award because, by reason of his injury, he may be unable to prove that he would inevitably have had remunerative employment during the period of his actual disability, so also, one temporarily or seasonally employed at wages above the scale which he was earning or is capable of earning during the remainder of the year may not justly claim disability compensation based on those seasonal or temporary wages for a disability arising during such employment which does not really disable the employee until after the temporary or seasonal employment has been carried through to completion without any loss of wages therefor."

Counsel stated that "The injured workman's disability reaches into the future and not the past and that his loss as a result of such disability has an impact only on possible future earnings," citing Larson's Workmen's Compensation Law, Volume 2, page 71, section 60.11. Larson in that section is discussing installment payments for permanent partial disability; nevertheless, it is conceded that the disability reaches into the future and the loss as a result of the disability affects the earnings during that future period. The question presented in regard to determining average daily wage earning capacity under the Alaska Act is the amount of wages which the employee could reasonably have been anticipated to have earned during the period of disability had he not been injured. The only logical means of estimating such loss of earnings is based on the past record of employment of the employee in the absence of the employee showing unusual circumstances to indicate that he would have received wages on a different basis during the particular year that his disability resulted. The statement of Judge Dimond in the *Vannev* case in regard to the duty of the applicant to show any such unusual circumstances is equally pertinent to the subject situation. He said:

"The petitioner himself offered no proof as to what he had earned in any preceding year between September 20 and December 31, or of his opportunity, actual or potential, for earnings between September 20 and December 31, 1946. Nor did he offer any proof as to his earnings, daily, weekly or monthly before June 1946. The only evidence on the subject was provided by the defendant's in-

surer to the effect that the petitioner paid income tax upon gross income of \$2,519.92 received between January 1 and September 15, 1946. This was not disputed. We know from all of the evidence that of his total income during the period mentioned, he earned \$1,463.70 between June 1 and September 15, 1946, and was paid that amount by the defendant Association, thus leaving a balance of \$1,056.22 which he must have earned and received between January 1 and June 1, 1946, a period of five months, which, when broken down, would amount to \$211.24 per month or almost exactly \$7.00 per day. Between June 1 and September 15, 1946, under his seasonal employment by the Association, his earnings averaged \$418.20 per month or \$13.67 per day.

“The only reasonable conclusion at which one may arrive, in the absence of any other evidence on the subject, is that plaintiff’s daily wages between September 20 and December 31, 1946, would probably not have exceeded the average of his earnings between January 1 and June 15, 1946. Accordingly, I find that the average wage earning capacity of the petitioner between September 20 and December 31, 1946, was not in excess of the amount agreed to by the Association’s insurer and approved by the Board of \$233.00 per month, or \$7.76 per day, and the award of the Board of Compensation for so much of that period as falls between October 9 and December 31, 1946, inclusive, is affirmed.

“If the petitioner is entitled to any additional compensation based upon his anticipated or possible earnings between September 20 and December 31, 1946, he has had ample opportunity to so

show. He was at all times represented by counsel. No such showing has been made or even suggested."

The burden is always on the employee to prove his average daily wages in a compensation proceeding. See *City of Connersville v. Adams*, 121 Ind. App. 353, 98 N.E. 2d 230, and *Bennett v. Walsh Stevedoring Co.*, 46 So. 2d 834, 253 Ala. 685.

Judge Dimond's decision in the *Vanney* case has been followed by the United States District Court for the District of Alaska, First Judicial Division, in the cases of *Harold Arentsen, d.b.a. Arentsen & Co. v. Enos Moore and Alaska Industrial Board*, No. 6462-A, U.S.D.C., D.A., Div. No. One, and *Buchan & Heinen Packing Co v. Alice V. Lawseth and Alaska Industrial Board*, No. 6463-A, U.S.D.C., D.A., Div. No. One, as well as in the subject case. In both of those cases a decision was made by the Alaska Industrial Board whereby the employees were to be paid compensation during the "off-season" based on their average yearly earnings rather than based on the earnings the employee would reasonably have anticipated to have earned during the off-season had he not been injured. In both cases, the District Court reversed, remanding the cases to the Alaska Industrial Board, and ordered "that the Alaska Industrial Board amend it previous decision and award * * * so that the amount of average daily wages * * * is computed in conformity with the opinion rendered in the case of *Vanney v. Alaska Packers Ass'n*, 12 Alaska Rep. 284." In both of these

cases the board then proceeded to award compensation based on the average daily wages which the employee would otherwise have been able to have earned during the off-season.

In the subject case, the board took the most liberal position reasonably possible in making its award for Mr. Giske. The board did not take the average of the past four years' earnings during the off-season, nor did it take the average of the highest three of the four previous years' earnings during the off-season. The board took the year during the past four years during which the employee had made his largest earnings during the off-season and assumed that, in the absence of any evidence by the employee to the effect that he might have earned more during the present period of disability, that amount represented his maximum wage earning capacity. Thus the earnings of \$648.00 during the year 1949 were taken as a basis for gauging the amount which he might otherwise have earned had he not been injured. On this basis, his average daily wage earning capacity during the period of his disability was found to be \$3.88.

As mentioned above, the Alaska Workmen's Compensation Act specifies that the findings of the board "shall be conclusive and binding as to all questions of fact." Sec. 43-3-22 A.C.L.A. 1949. The board in the subject case has found that Giske's average daily wage during the period of his disability was \$3.88 per day. This was affirmed by the learned judge of the United States District Court for the District of Alaska. The

law in regard to appeals from a board's findings is set forth in Larson's Workmen's Compensation Law, Volume 2, Sec. 80.10, as follows:

“A finding of fact based on no evidence is an error of law. Accordingly, in compensation law, as in all administrative law, an award may be reversed if not supported by any evidence. Conversely, since the compensation board has expressly been entrusted with the power to find the facts, its fact findings must be affirmed if supported by any evidence, even if the reviewing court thinks the evidence points the other way. This statement is, without any close competition, the number-one cliché of compensation law, and occurs in some form in the first paragraph of compensation opinions almost as a matter of course.”

It would be superfluous to cite the many cases supporting this well established principal of law. Certainly there is substantial evidence upon which the Alaska Industrial Board and the United States District Court for the District of Alaska determined that Mr. Giske's average daily wage during the period of his disability was not in excess of \$3.88 per day.

CONCLUSION.

Adequate findings of fact were made by the Alaska Industrial Board in its decision and award and, in any event, appellant is precluded from objecting to any alleged absence of findings in view of the fact that no requests for findings were made before the board and

no objections raised before the board or the United States District Court or in the statement of points relied upon on appeal.

The findings of the Alaska Industrial Board to the effect that Giske's average daily wage earning capacity during the period of his disability amounted to \$3.88 was amply supported by the evidence, and it is respectfully submitted that the decree of the United States District Court for the District of Alaska should be affirmed.

Dated, Juneau, Alaska,
March 30, 1955.

FAULKNER, BANFIELD & BOOCHEVER,
By R. BOOCHEVER,
*Attorneys for Appellees Halferty
Canneries, Inc. and D. K. Mac-
Donald & Co.*

No. 14,568

IN THE
United States Court of Appeals
For the Ninth Circuit

JOHN D. SHAW,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the District Court, Territory of Alaska,
Third Division.

BRIEF OF APPELLANT.

HAROLD J. BUTCHER,

Box 156, Anchorage, Alaska,

Attorney for Appellant.

FILED

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VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

**Appeal from the District Court, Territory of Alaska,
Third Division.**

BRIEF OF APPELLANT.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of conviction by the United States District Court, District of Alaska.

The offense charged in the information is a violation of Section 284, Title 18, United States Code. This Court has jurisdiction under provisions of 28 United States Code, Sections 1291, 1294(2).

THE FACTS.

The appellant, John D. Shaw, from 1944 until 1951 was employed by the Alaska Railroad as a train dispatcher.

Prior to coming to Alaska in 1944 he had studied law at California and by reason of adversity had been unable to complete his college work.

Possessed of a continuing desire to complete his studies in law he registered in 1947, under provisions of the Alaska Code, as a law clerk in the office of a practicing attorney. (TR 177.)

For a period of four years, by working a regular shift for the Alaska Railroad at night, he was able to complete his prescribed course of study and incidentally the requirements of his legal clerkship. He applied for and was approved for the Alaska Bar and upon taking the examination was admitted to practice in November of 1951. Promptly thereafter he resigned his position as train dispatcher and commenced to practice law.

Meanwhile other events were taking shape on the Alaska Railroad which resulted in a collision at Rainbow Station on the main line tracks of the railroad on March 24, 1950. Extra train No. 562 was proceeding south towards Seward when passing around a blind curve it ran head on into a track car towing several manhaul cars, proceeding north toward a construction camp at Rainbow. The manhaul cars were carrying as passengers a group of construction workers, performing railroad rehabilitation work for Morrison-Knudsen, a private contractor. The impact of train and track car killed two men and critically injured a dozen others.

This collision occurred at approximately 5:15 P.M. while appellant was on duty in the Anchorage office.

The movement of trains is controlled in the dispatcher's office, and the actual control of train movements, at the time of day indicated, is through two control boards. One board, known as the "north board," controls the train movements north of Curry. The other board, known as the "south board", controls train movements south of Curry. Rainbow, the scene of the collision, is south of Curry and Anchorage, and comes under the south control board. Appellant was operating the north board. (TR 207.) Train dispatcher, Kerwin Frank, was operating the south board. (TR 155.) The time being after regular working hours and the regular chief dispatcher having left for the day, Shaw, the oldest in terms of seniority, was also acting as chief dispatcher.

When the collision occurred one of the train crew walked to the station of Rainbow and called the dispatcher's office and reported the accident. Kerwin Frank, dispatcher on the south board, took the report and was so emotionally upset by the deaths and injuries he could not issue the necessary emergency instructions to the persons in charge at the scene of the collision. He called to appellant and asked him to take over the south board telephone and handle the matter. Appellant took over the south board, talked to the train crew, ordered the dead and injured to be placed aboard and directed the train's return to Anchorage. While the return trip was being made, appellant arranged for ambulances to meet the train and for doctors and hospitalization. Upon completion of this emergency service appellant made a report of the incident on the train dispatchers' sheet. (TR 87.)

Within a short time the news of the accident was broadcast over local radio stations and the following day the story was carried in great detail by local newspapers. (TR 116, 117, 206.)

The injured men, while hospitalized, required legal counsel regarding compensation and other matters and a local attorney was retained by them for that purpose, and for a period of nearly two years thereafter this attorney advised and counseled with these men and looked after their legal rights. (TR 179.)

Just prior to the expiration of the Statute of Limitations (two years) this attorney advised these men to file suit against the United States under the provisions of the Federal Tort Claims Act and caused to be prepared a complaint for that purpose.

Appellant in the meantime had completed his course of study and his legal clerkship under this same attorney, and having been admitted to the bar, had commenced to practice law and had opened his office in space immediately adjoining the office of the attorney under whom he had studied.

Upon the invitation of this attorney, appellant agreed to assist in the prosecution of the suit against the United States and became, for a time, attorney of record in the case. (TR 180, 203.)

However, within a short time, appellant departed Anchorage and opened his office in Palmer, Alaska, where he resided and practiced law. The attorney who had solicited Shaw's entry into the case, needing the service of a local attorney in the preparation of the

suit, procured the association of George Grigsby, attorney-at-law, and promptly thereafter filed an amended complaint. Appellant, then at Palmer and unavailable for direct assistance, consented to this association. (TR 180 and 181.) Appellant's participation in the case thereafter was of little consequence. He interviewed two or three witnesses and served one or two subpoenas. (TR 205, 225.) The case was set for trial in January of 1953, and just before it came on appellant withdrew as attorney of record. (TR 183.) Appellant had no further connection with the trial or the events connected with the trial which followed.

Following the trial of this tort claims case, which came to be known as the "Dushon case", the trial judge ruled that the plaintiffs did not have a claim against the United States. The Assistant District Attorney, who had represented the United States, one Arthur D. Talbot, promptly caused to be issued an information resulting in the arrest of appellant for allegedly violating Section 284, Title 18, USC. (TR 1.)

Appellant, through his attorneys, moved to dismiss the information on the grounds that the information did not state facts sufficient to charge an offense against the United States. (TR 15.)

This motion was denied. (TR 18.)

Appellant entered a plea of not guilty and the case was set for trial on June 15, 1954. On that date trial was had and the appellant was found guilty of violating Section 284, Title 18, USC and from that conviction brought this appeal.

QUESTIONS PRESENTED.**I.**

Did the information on which appellant was tried state an offense against the United States?

II.

Does Section 284, Title 18, USC, cover claims against the United States which arise in tort?

III.

Did the United States prove a violation of Section 284, Title 18, USC?

IV.

Could the subject matter of the work which defendant was hired to perform include an accident resulting from the negligence of third parties?

V.

What is the "claim" involved in the Dushon case?

VI.

Did the claim in the Dushon case involve any subject matter directly connected with which appellant was employed?

ARGUMENT.**POINT ONE.**

The Court erred in denying defendant's pre-trial motion to dismiss the information on the ground that it did not state an offense against the United States.

The information did not state an offense against the United States and should have been dismissed on defendant's pre-trial motion to dismiss.

Section 284, Title 18, USC, reads as follows:

(a) Whoever, having been employed in any agency of the United States, including commissioned officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duty, shall be fined not more than \$10,000.00 or imprisoned not more than one year, or both.

The first requirement of a good and sufficient indictment or information brought under this section would be an allegation that the defendant was an employee of the United States. This information states only that "John D. Shaw was employed by the Alaska Railroad, a government agency". There was no allegation that he was an employee of an agency of the United States. The information was therefore defective. The most essential of the various elements necessary for this information to state an offense under Section 284, had not been alleged.

The second element necessary to a good and sufficient indictment or information brought under Section 284 would be an allegation that the defendant prosecuted, or acted as counsel, attorney or agent for prosecuting, a claim against the United States involv-

ing subject matter directly connected with which the defendant was employed or performed duty.

This information charges "that on March 24, 1950, the said John D. Shaw was directly connected with and performed duties relating to an accident which occurred at or about 5:15 P.M. on said day when Extra Train No. 562 South, of the Alaska Railroad came into collision with a gas car and trailers attached, operated by a government contractor, at or near Rainbow at mile 91.7 on the Alaska Railroad". The allegation that the defendant was directly connected with and performed duties relating to *an accident* does not seem to meet the requirements of the statute which provides that the defendant must * * * act as attorney * * * for prosecuting a claim involving subject matter directly connected with which said person was employed or performed duty.

When the specific wording of the information is applied to the specific wording of the statute it appears that the defendant, at least on the face of the information, is not charged with the offense spelled out in the statute. The defendant is obviously not charged with prosecuting a claim involving subject matter with which he was employed or performed duty, but is charged with being directly connected with and performed duties relating to *an accident*. An accident is presumed to arise from negligence. Negligence as such was not within the scope of defendant's employment nor was it included among the duties he performed. An employee in performance of his duty might investigate an accident but this accident was not

the subject matter of the claim. The subject matter of the Dushon claim was the right of Dushon for compensation for the injury sustained by him caused by the negligence of the party responsible.

Does Section 284, Title 18, USC, include claims against the United States which sound in tort?

A careful examination of Section 284, its text, its legislative origin and the intent of congress in enacting the statute will show that claims arising in tort are beyond its purview.

This statute is intended to prohibit former government employees from prosecuting claims against the United States which involve subject matter with which such persons were employed or performed duty.

Section 284, as it appears in Title 18, became law by the enactment of the act of June 25, 1948, Chapter 645, 62 Stat. 698, revised and codified Title 18.

Section 284 is the result of the consolidation of former Section 100 of Title 5, USC, and former Section 119 of Title 41, USC.

The more thought we have given to the meaning of this section the more it appears to require judicial interpretation. In our effort to understand what the congress intended by this consolidation of the two former sections, we went to the revisor's notes. We found that congress intended consolidation only.

There is ample precedent to guide us in this course. In the case of *People v. Fox*, 110 N.E., 26, 29, the Court said:

“ ‘The rule is elementary that the primary object of construing a statute is to ascertain and give effect to the true intent and meaning of the Legislature in enacting it; that it is ‘the intention of the lawmakers that make the law.’ *Hoyne v. Danisch*, 264 Ill. 467, 106 N.E. 341. For the purpose of ascertaining and giving effect to this intention of the lawmakers, it is proper to consider the occasion and necessity for the law . . . Where the spirit and intention of the Legislature in adopting the act are clearly expressed, and its object and purposes are clearly set forth, the courts are not confined to the literal meaning of the words used, when to do so will defeat the obvious legislative intention and result in absurd consequences not contemplated or intended by it. In such cases the literal language of the statute may be departed from, and words may be changed, altered, modified, and supplied, or omitted entirely, if necessary to obviate any repugnancy or inconsistency between the language used and the intention of the Legislature as gathered from a consideration of the whole act and the previous condition of legislation upon that subject.’ ”

In the case of *Morissette v. United States*, 342 U.S. 246, 265, Justice Jackson, in order to determine the intent of congress in the enactment of Section 641, Title 18, went unhesitatingly to the legislative history. Justice Jackson in that case said:

“This section with which we are concerned was enacted in 1948, as a consolidation of four former sections of Title 18, as adopted in 1940, which in turn were derived from two sections of the Re-

vised Statutes. The pertinent legislative and judicial history of these antecedents, as well as of section 641, is footnoted. We find no other purpose in the 1948 re-enactment than to collect from scattered sources crimes so kindred as to belong in one category.”

In the case of *United States v. Bergson*, 119 Fed. Sup. 459, Judge McLaughlin sought to determine the intent of congress in the enactment of Section 284, and took notice of the legislative history, the revisor’s notes, and other data throwing light on the intent of congress and the construction of statutes. Judge McLaughlin particularly quotes with favor Justice Reed’s conception of the interpretation of statutes in the case of *United States v. American Trucking Association*, 310 U.S. 534, and then in the *Bergson* opinion, *supra*, says:

“Passing the salient statement of the Court that in the interpretation of Statutes there is no more persuasive evidence of the purpose of the Statute than the words by which the legislature undertook to give expression to its wishes, as well as that in which the Court states that often these words are sufficient in and of themselves to determine the purpose of the legislation, this Court goes on to comply with the Supreme Court’s injunction, upon which the opinion states emphasis should be laid, to the appraising the purposes as a whole of Congress, or in other words, to look to legislative intent. No judicial construction of the applicable section having been brought to the Court’s attention, *the Court turns to the* legislative history of the Act.” (Emphasis added.)

The revisor's notes, which immediately follow Section 284 in Title 18, USC, state that a consolidation of Section 100, Title 5 and Section 119, Title 41, was made: (1) with changes necessary to effect the consolidation and, (2) changes in phraseology were made. The reports of congress will show that no enlargement of the scope of these two laws, nor any substantive change in the consolidated sections, was intended by the revisors, or by the congress. (House report No. 304 of the 80th Congress, Page 2443.) During the hearing on revision the chief revisor, one William W. Barron, and the chairman of the committee engaged in a brief discussion on the subject of whether changes in substance would be shown. The discussion as follows:

“The Chairman. Just to get back briefly to the question of substantial changes in existing law contained in the bill: Am I correct in my understanding that the revisor's notes will set forth clearly what the substantive changes are?

Mr. Barron. Yes.

The Chairman. So that any member of the house or any other interested person, looking at that, can take these notes and determine quickly what the changes have been.

Mr. Barron. In the great majority of cases you will find that only minor changes of phraseology were made. Every substantive change, no matter how minor, is fully explained so that if you in your discretion see fit to make these notes part of your report, they will adequately serve to interpret every proposed change.”

Had there been any intent to accomplish more than bare consolidation the revisor's notes would show such

intent. These notes, as they pertain to Section 284, show that *no substantive change was made and no substantive change was intended*.

The report of the Senate Judiciary Committee on revision, filed June 14, 1948, states in the fourth paragraph:

“This bill makes it easy to find the criminal statutes because of the arrangement, numbering and classification. The original *intent of Congress is preserved*, a uniform style of statutory expressions is adopted.” (Emphasis added.) Page 2427, Legislative History.

The report of the House Committee dated April 24, 1947, in the “Preliminary Statement” after showing sources of material and organization said:

“Revisions, as distinguished from codification, meant the substitution of plain language for awkward terms, reconciliation of conflicting laws, omissions of superseded sections, and consolidation of similar provisions.” Page 2435 Legislative History.

The foregoing page numbers refer to pages found in the paper bound advance volume of Title 18, United States Code, “Congressional Services,” issued by West Publishing Company prior to the appearance of Title 18 as part of West’s United States Code Annotated. The first half of this volume contains Title 18 as revised. The second half of the volume contains the legislative history and the revisor’s notes. The writer of this brief was unable to find in the District Court Library at Anchorage, a better reference than this advance paper bound copy of Title 18, Legislative

History and Revisor's Notes. It is presumed that a better reference exists but which at this time is not available in Alaska.

To insure the same source reference, this writer will endeavor to provide for the use of the Court one or more of these paper bound editions of Title 18, "Congressional Service," Legislative History and Revisor's Notes so that the reference source may be available in the event that the Law Library of the United States Court of Appeals, Ninth Circuit, may have discarded the paper bound copy upon receipt of the regular copy of Title 18, USCA, as have so many other libraries.

Other page references contained in this Legislative History and Revisor's Notes which throw light on the revisor's purpose and the intent of Congress are: 2442, 2443, 2471, 2668, 2696 and 2725. On this last page under the heading "Reasons for Enactment" is found the following paragraph and note:

"6. All offenses are defined simply, thus avoiding repetitions. The only changes of any substance to the criminal statutes are those which harmonize and make uniform the punishment for felonies and misdemeanors in the interest of justice.

* * * * *

Note—a codification merely assembles all the laws, no matter how poorly drafted, in a code without attempting to make corrections and improvements; a revision cures the defects and restates the laws simply and understandably."

Neither Section 100 of Title 5, nor Section 119 of Title 41, as they were enacted and interpreted before codification, included claims arising in tort.

Judge McLaughlin, in the *Bergson* case, *supra*, correctly found that:

“Section 99 of Title 5 prohibits former officers and employees of the United States from prosecuting any claim against the United States if such claim was pending in the department while they were employed there. This section had its origin in the Post Office Appropriation Bill of June 1, 1872, 17 Stat. 202, Rev. Stat. 190. The section is similar to Section 284 of Title 18 in that it refers to former employees and officers. However, there is a difference, in that Section 284 prohibits prosecuting any claims, while Section 99 refers only to claims in departments. Thus, Section 284 is a broader prohibition than Section 99 only so far as concerns place of prosecution.

Former Section 100 of Title 5 was a section of the Act of July 11, 1919, which was the Army Appropriation Bill of that year. This section prohibited any former commissioned officer or employee of the United States, who had been employed in procuring supplies for the Military Establishment, from soliciting or accepting employment in the presentation of claims against the Government arising out of any contracts or agreements for such supplies. This action was limited in time of application to persons who served in such capacities between April 6, 1917 and July 11, 1919.”

Former Section 119 of Title 41 appeared in the United States Code under the main heading of “Public Contracts”. Neither that section nor anything similar had ever appeared under the heading of crimes in the United States Code until the appearance of

Section 284 in the 1948 revision of Title 18. Section 119 of Title 41 was sub-section 19(e) of the "War Contracts Settlement Act of 1944" (58 Stat. 667). The subject matter of that act was confined exclusively to the settlement and termination of war contracts, and the penal sub-section 19(e) could logically apply only to the subject matter of the act. Although sub-section 19(e) prohibited the prosecution of any claim against the United States, it is surely not intended to include tort claims. Sutherland on Statutory Construction, Vol. 3 at page 42 citing the cases of *Caminetti v. United States*, 242 U.S. 470, and *Holy Trinity Church v. United States*, 143 U.S. 457, quotes them respectively as follows: "Cases not within the reason, though within the letter, shall not be taken to be within the statute" and "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute because not within its spirit, nor within the intention of its makers."

If claims arising in tort were to be construed to be within the "claim" covered by Section 284, then certain classes of claimants would be denied the remedies available under Federal Tort Claims Act, Section 2674, Title 28 USC.

To illustrate the foregoing proposition we will assume that:

A, is a registered nurse employed by the United States Public Health Service. While she is so employed she develops a skin infection. B, is a doctor employed by the Public Health Service who treats A. B, through negligence, applies to A's

skin a solution which contains acid and A's face is disfigured. A subsequently leaves the Public Health Service and within two years of her separation from that service files suit under the Federal Tort Claims Act for damages.

Section 284 which prohibits a former employee from prosecuting, among other things, a claim against the United States within two years after employment has ceased, involving any subject matter directly connected with which the person was employed or rendered service could be invoked against A, if that section were construed to cover tort claims, and if it covered incidental duties connected with employment, or if it is construed to cover appellant.

Judge McLaughlin, in the *Bergson* case, following his examination of the legislative history of Section 284, concluded as follows:

“This Court has concluded, as aforestated in its foregoing analysis, that the legislative history of Section 284 is such as to persuade the Court that the Term ‘Claims against the United States’ as used in said Section is intended by Congress to be limited, and consequently that such term is limited to demands against the Government for money or for property.”

A similar analysis will show that Congress in using the term “Claims against the United States” in Section 284, intended to limit claims upon the government to those specified in Sections 100 of Title 5 and 119 of Title 41 USC, before revision and codification, and did not by such codification intend to create any new offense.

Section 284 and other related statutes comprise what is known as the so-called "Conflicts of Interest" statutes. In *United States v. 679, 19 acres of land, more or less, etc.*, 113 Fed. Sup. 509, the United States District Court for the District of North Dakota, Vogel J. (decided in 1953), made a careful analysis of Section 283, Title 18, USC, which analysis is pertinent to this appeal. Section 283 is similar to Section 284 in that it prohibits an officer or employee of the United States or any department or agency thereof from acting as agent or attorney for prosecuting claims against the United States or aiding or assisting in the prosecution or support of any such claim otherwise than in the proper discharge of his official duties. The facts show that, one Felix Adams, an employee of the United States Soil Conservation Service, appeared as a witness in behalf of the landowners whose property was being condemned. He had been employed by the landowners to examine their land and testify regarding the same. Government counsel protested, citing Section 283, whereupon Adams refused to testify on the grounds that to do so might incriminate him. In ordering him to testify the Court noted that Adams had examined the landowners' farms on his own time *and had made use of nothing belonging to the government* with the possible exception of tract maps which were available to anyone who asked for them. (Emphasis added.) The Court said:

"First, the statute did not have in contemplation a situation such as that with which we are here dealing. The statute was passed by Congress for the purpose of preventing government em-

ployees from making use of *private government information* to assist persons who had claims against the United States. Second, it was also passed by the Congress for the purpose of prohibiting government employees who had access to government files from obtaining therefrom information regarding persons who might possibly have claims against the government and then soliciting the representation of the owners of such claims or assisting them in some way earning fees.” (Emphasis added.)

Defendant Shaw was in possession of no information about the Rainbow accident that was confidential or that could be used detrimentally against the United States, as the testimony will show, he had no information, confidential or otherwise, that was not known by every person who read the newspapers or listened to the radio. (TR 116, 117, 206.)

It shows in the testimony that the officials of the Alaska Railroad held an investigation to determine the cause of the Rainbow accident and called into that investigation all persons who had knowledge of the accident. Neither defendant Shaw nor any other person from the dispatcher’s office was called to testify at that investigation. Excerpts of testimony from the transcript of record commencing at page 98 and to and including page 109 will show that the railroad officials called into the investigation all persons who could throw light on the cause of the accident and that at the conclusion of that investigation the results showed that no employee of the Alaska Railroad was at fault including the dispatcher’s office and including defend-

ant Shaw, and that the negligence which was the cause of the collision was the negligence of the track car operator, an employee of a private contractor. We quote excerpts of the testimony of John Manley, Assistant General Manager of the Alaska Railroad in that connection:

“Q. Mr. Manley, there was a railroad investigation of this matter, wasn't there?

A. Excuse me.

Q. There was a railroad investigation of that matter?

A. There was.

Q. One at Seward and one at Anchorage?

A. I believe that is correct.

Q. And those investigations were determined, to determine how the accident happened and who was responsible for it and all about it, isn't that so?

A. That is right.

Q. And, as a matter of fact, didn't the railroad call in everybody concerned with the accident and in those type of proceedings and try to determine what everybody who has any knowledge about it can tell them to shed light on it?

A. In an accident involving trains normally the train crews are called in.

Q. Well, but you are interested in finding out who was wrong, aren't you? Why the accident happened, that is the reason of the investigation, isn't it?

A. That is correct.

Q. So you had called everybody that could tell you anything that might shed light on how the accident happened and whose fault it was, isn't that a fact?

A. Not necessarily so. In an incident such as this, we normally call in the train crews. The dispatcher's actions are largely a matter of record.

Q. You mean to say—I don't understand you, Mr. Manley—if you are trying to place responsibility for an accident and you hold a railroad investigation, aren't you going to talk to everyone who can shed light on that, how that happened, if they know anything or made any error of if they could place any error of being, you are not going to talk to all the employees, but you are going to talk to all of those who can give you pertinent information about the accident, isn't that true?

The Court. Just a moment, please, now what is your question?

Mr. Groh. I again must object to it.

The Court. Objection sustained. If you want to ask him, Mr. Rader, as to what they did in this case, that is satisfactory.

By Mr. Rader. Q. Did you have a Railroad investigation in this case?

A. We did.

Q. And where?

A. I want to ask you if John Shaw was called to either of those to testify or give information?

A. I do not know.

Q. I am handing you a document that is marked Plaintiff's Exhibit No. 6 in Cause A-7605 and A-7603 and ask you if you have ever seen that document before and if you know what it is?

A. I have seen this document or copy of it before.

Q. Do you know what it is?

A. It is a transcript of the investigation held in the Yard Office at Seward, Alaska, on April 1, 1950.

Q. And were you there?

A. No, I was not there.

Q. Were you at the investigation that was held in Anchorage?

A. No, I was not.

Q. I want to ask you if Mr. Shaw was at the investigation held at Seward anyway?

Mr. Groh. Objection, Your Honor. He doesn't know, he wasn't there.

Mr. Rader. Well, he is——

The Court. I point out to you, Mr. Rader, that has already been asked and answered. He said he didn't know whether or not Mr. Shaw——

Mr. Rader. I was trying to refresh his recollection from this document that he wasn't there and he has seen this document in the ordinary course of business.

Mr. Groh. I request that counsel's remarks be stricken, Your Honor.

The Court. Yes, it is argumentative. The jury is instructed not to consider the remark made by counsel. The witness has testified that he was not there in Seward and even though he may have seen other papers, that doesn't prove necessarily that Mr. Shaw wasn't there so, therefore, he testified he doesn't know.

By Mr. Rader. Q. Mr. Manley, do you recognize that as being the official transcript of the proceedings held in Seward?

A. To the best of my knowledge that is a copy of the transcript of the investigation held in Seward.

Mr. Rader. I would like to offer it in evidence.

Mr. Groh. Your Honor, I don't believe he can introduce evidence through my witness.

The Court. It is out of line, Mr. Rader, you should identify it. It may be admitted for identification purposes only, if you so desire.

Mr. Groh. If he wants to introduce it, Your Honor, I suggest he call Mr. Manley back as his own witness.

The Court. Well, he can do it any way he wants to, but at this time if you desire it may be admitted for identification purposes only.

Mr. Rader. All right, fine, I don't want to waste any more of Mr. Manley's time.

The Court. It isn't a question of that. It is a question of doing it right.

Mr. Davis. What will that be, No. 5?

The Court. That will be No. A.

Mr. Rader. Your Honor, it has not been admitted.

The Court. No, identification only.

By Mr. Rader. Q. Mr. Manley, you do know, do you not, as the result of the railroad investigation as to who they placed the responsibility of the accident on?

Mr. Groh. Objection, Your Honor, I don't see the relevancy of this testimony.

The Court. What is the relevancy, Mr. Rader?

Mr. Rader. If it please the court, Mr. Shaw is charged with having instituted a suit within two years of employment and that the subject matter of that employment and the subject matter of the suit are the same in effect. Now, I merely want to show that by the Railroad that they didn't consider that Mr. Shaw had anything to do with the accident and that the responsibility and the sole and complete responsibility for the accident was not the Dispatcher's office or any place else,

but was down on the railroad with the gas car operator and I think this gentleman will so testify. It is very relevant.

The Court. Well, I think it is proper cross examination.

Mr. Groh. Your Honor, if I may be heard.

The Court. Objection overruled.

Mr. Groh. Very well.

The Court. You may answer.

A. The result of the investigation is held by the Railroad and perusal of our, of the Alaska Railroad's train sheets and dispatcher's reports led us to believe that the railroad or railroad personnel were blameless as regards the accident.

Q. That includes the Dispatcher's office?

A. That would include the Dispatcher's office.

Q. That would include Mr. Shaw?

A. That would include Mr. Shaw. That would include all the personnel in the Dispatcher's office.

Q. And you also concluded, did you not, that the reason for the accident was the negligence of one, Mr. Green, the gas car operator, 40 miles down the track south of here, isn't that correct?

Mr. Groh. Your Honor, I object again. I don't think this testimony *if* relevant. Contrary to what Mr. Rader says there is nothing in this information which says that the accident was the responsibility or that John Shaw had anything to do with that accident. All this information says is that he was an attorney for a group of plaintiffs who commenced a lawsuit on the basis of an accident that occurred down on the railroad and that he had been formerly employed by The Alaska Railroad as an Assistant Chief Dispatcher and that is how it comes within this conflict of the statute.

The Court. Mr. Groh, isn't it a question of argument?

Mr. Groh. No, Your Honor, it is a question of relevancy on any question, any bit of evidence on this criminal information and on the rights allowed to Mr. Shaw. This evidence is completely irrelevant.

The Court. Well, the court appreciates the fact that it doesn't have much probative value as to the defense of Mr. Shaw, but, on the other hand, because of the fact that you developed it on direct examination I think it is proper cross-examination.

Mr. Groh. But I don't think I did, Your Honor.

The Court. As I recall, you offered to admit in evidence the Complaint and all of the allegations of the cause of action through this witness, is that not true?

Mr. Davis. Your Honor, I think I might clear this up.

The Court. The court doesn't want to get any more into the act than we have here at the present time and based upon that you opened the door on this type of questioning, therefore, the objection is overruled.

Mr. Groh. Very well.

A. I think it would be more accurate that the Railroad conclusion was that an employee of the contractor was negligent.

Q. Well, without being too precise, the employee of the contractor who operated the gas car, isn't that what it was?

A. That is correct.

Q. M-K?

A. The employee of the contractor who copied the line-up.

Q. Well, at least it wasn't any railroad employee?

The Court. He so testified, Mr. Rader.

Mr. Rader. Well, I am confused here because he said, 'copied the line-up.'

A. We concluded that there was no railroad employee liable or to blame for the accident.

Q. Mr. Manley, this document that you identified, Plaintiff's Exhibit No. 2, let me ask you if—strike that—Mr. Manley, did you make any public statements to the newspapers or otherwise as to the accident?

Mr. Groh. Objection, your Honor.

The Court. Objection sustained.

By Mr. Rader. Q. I am handing you Plaintiff's Exhibit No. 2 and ask you to—I think you previously identified it—and I want to ask you if there is anything in that that is confidential?

A. I would identify this as a routine inter-departmental report.

Q. Merely a report of a practical ordinary event that happened, isn't that a fact? It is not a report that is standard, this is not the accident report or anything of that nature concerning this accident?

A. No, this is not a standard——

Q. You have the official accident records, don't you?

A. That is right.

Q. This is just a memorandum, an inter-office memorandum, more or less?

A. This was an inter-office memorandum submitted for information.

Q. I want to ask you if there is any information in that that is confidential or secret?

Mr. Groh. Your Honor, I object to that.

The Court. Well, I point out to you, Mr. Groh, that it has been admitted in evidence and I think he has a right to go into the nature of it, therefore, I feel that it is proper cross-examination based upon that.

Mr. Groh. Very well, your Honor.

A. I don't understand what is meant by confidential or secret.

Q. Well, let me explain it to you.

The Court. Well, does counsel know.

Mr. Rader. Well, if he doesn't understand I will try to make it clear to him by rephrasing my question.

By Mr. Rader. Q. Is there anything there that would be damaging to the Railroad?

The Court. In that respect, that calls for a conclusion. The objection will be sustained on that. You may ask him who is entitled to this information.

By Mr. Rader. Q. Who is entitled to that information?

A. Those parties to whom it is addressed. In this case it is All Concerned with the accident, all employees concerned with the accident.

Q. Well, that would be quite a number of people, wouldn't it? How do you find out who is concerned with the accident? You just make that thing public, don't you, and send those around to all of the offices?

A. Well, this report would—normally a report of this type would normally go to the Superintendent's office and sufficient copies would be made

so the Superintendent could pass the information along to the other officer, the General Manager, to the office of the Assistant General Manager, to the office of Communication, and in this particular case, to the contracting officer who is administering the contract between Morrison-Knudsen and The Alaska Railroad.

Q. And to Morrison-Knudsen?

A. No, it would not go to Morrison-Knudsen.

Q. Well, let me ask you again then. Using the same wording as before——

The Court. Let's not go back over the same thing.

Q. I withdraw my question. I want to ask him if there is anything confidential in that report?

A. I would say there is nothing more confidential—this report is no more confidential than all routine information reports which emanate from the Dispatcher's office.

Q. Do you recall, Mr. Manley, reading the newspapers immediately after this accident *and your own statement to the newspapers about the accident?*

Mr. Groh. Objection, Your Honor.

The Court. Objection sustained, hasn't any bearing on this witness.

Mr. Rader. Well, if it please the court, this gentleman has testified that it is no more confidential than other memorandums. We can show, I believe, and if I refresh Mr. Manley's recollection, that there is nothing in there that wasn't also in the newspapers.

The Court. I don't—I point out to you, Mr. Rader, that that is argumentative.

Mr. Rader. Well, if the witness has said that it appears to be only for limited or careful consideration—I want to direct the witness' attention to the fact, and I want to refresh his recollection if he did read the newspapers and if that type of thing was public information as to what was on that, was on that piece of paper.

The Court. Well, I point out to you, Mr. Rader, the mere fact it may be in the newspaper, it may be in there wrongly and so it doesn't have any probative value to this case.

Mr. Rader. Well, it certainly couldn't be confidential information if it came out on the 25th of March.

The Court. That is argumentative, Mr. Rader. The court has ruled that you are going too far afield. It is too irrelevant to the issues of this case."

This testimony also shows at pages 108 and 117 that railroad officials issued a statement to the newspapers on the day following the accident and that said newspaper release carried all the information contained in the railroad report following the investigation, and the proceedings at those pages and at page 102 will further show that the Court erroneously refused to let this report into evidence.

We reiterate that the United States in the prosecution of this case failed to show that the defendant had access to information regarding this accident or that he furnished information to anyone regarding this accident. That the railroad had nothing to hide, that officials of the railroad made statements to the press that contained all details of the accident.

In the *Bergson* case, *supra*, the Court carefully analyzed the legislative history of Section 284, to ascertain the intent of Congress. The results as have been shown limited the term "Claims against the United States" and exonerated Bergson from a charge of violating the statute.

In the case of *United States v. Bramblett*, 348 U.S. 503, the Supreme Court utilized the same process in construing former Section 1001 Title 18 U.S.C. (old) to insure the conviction of Bramblett. Bramblett, a former congressman, was indicted for violation of Section 1001 Title 18. He was tried in the United States District Court for the District of Columbia and was convicted. On a motion for arrest of judgment the Court held that because of the express wording of the statute wherein it prohibited the falsification of a material fact "within the jurisdiction of any department or agency of the United States" that it did not extend to the legislative or judicial branches of government, and exonerated Bramblett.

The Supreme Court went back into the history of this particular piece of legislation to ascertain the intent of Congress, and found that there was no indication that the revision of the statute (1934) was intended to work any substantive change, and that the statute retained its original purpose which before revision would have covered Bramblett's conduct, regardless of the inclusion by the 1934 revisor of the restrictive phrase "in any matter within the jurisdiction of any department or agency of the United States." The trial Court's arrest of judgment was

reversed upon a finding by the Supreme Court after it ascertained the true intent of Congress by a review of the legislative history of the act.

Thus, the intent of Congress, applied to the interpretation of statutes, can result in both acquittal and conviction.

The intent of Congress in the codification of Section 284 is clearly shown in the legislative history, and that showing is to the effect that no new offense has been added to Sections 100, Title 5 or 119, Title 41, U.S.C. as revised and codified.

These two sections were designed and subsequently enacted to cure an existing evil. Each depending on its own test clearly shows its intent, each depending upon its legislative history shows its intent, i.e., to prevent employees of the United States, who in the course of their employment or performance of their duties, become familiar with the matters involving claims against the United States, or matters involving contracts to which the United States is a party, and who having separated from the service of the United States, act as counsel, attorney or agent for the claimant, and because of their unique position are able to lend to the claimant an advantage he did not formerly have.

When these two sections, 100 Title 5 and 119 Title 41, were enacted *the United States was not liable in tort*. Any relief granted to an injured person arising from the commission of a tort by an employee or agent of the United States, must come, if it comes

at all, by special act of Congress and results from the desire of Congress to extend relief. No *right* existed in the injured person to demand or receive such relief.

In 1945 the Congress enacted the Federal Tort Claims Act, Section 2674, Title 28, U.S.C., *and for the first time claims arising in tort could be filed against the United States*, by persons injured through the negligence of agents of the United States.

The possibility, therefore, that either Sections 100, Title 5 or 119, Title 41, could have included claims arising in tort, is eliminated, for the obvious reason that there existed no *right in any person to claim against the United States in tort*, at the time the two foregoing sections were enacted, and not until 1945 did the Congress by enactment of section 2674, Title 28, U.S.C., create such a right.

Section 284, Title 18, limited as it was at its enactment, to bare consolidation, as the history of the legislation will clearly demonstrate, could not embrace a claim arising in tort.

POINTS TWO AND THREE.

The Court erred in denying defendant's motion for Judgment of Acquittal at the conclusion of the government's evidence. The defendant contends that the government failed to prove a violation of Section 284, Title 18, U.S.C., and the Court again erred in denying the renewal of the motion at the close of the trial.

The burden was on the United States to prove that the defendant had violated Section 284, Title 18, U.S.C. If the United States failed to prove beyond a reasonable doubt that the defendant had violated Section 284, then the defendant was entitled to a judgment of acquittal and the Court should have granted the motion.

The Court instructed the jury as to the “burden of proof beyond a reasonable doubt” in the following language:

“3. The essential elements of this crime, each of which the government must prove beyond a reasonable doubt are:

(1) That the defendant was employed by a *governmental agency*, namely, the Alaska Railroad. (Emphasis added.)

(2) That the defendant prosecuted or acted as counsel, attorney, or agent for prosecuting a claim against the United States.

(3) That the claim which defendant prosecuted or for which he acted as counsel, attorney or agent in prosecuting involved subject matter directly connected with defendant’s employment or service with the Alaska Railroad.

(4) That the defendant prosecuted or acted as counsel, attorney or agent for prosecuting such claim within two years after his employment had ceased.” (TR 37, 38.)

The Court, having instructed the jury on what the Court considered the elements of proof to be, continued to instruct as follows:

“You are instructed as a matter of law that the Alaska Railroad is a *governmental agency* within the meaning of the above quoted statute.” (TR. 38.) (Emphasis added.)

We believe that while it is understandable that a prosecuting attorney may draw an inexact and sometimes defective indictment based on his lack of understanding of the law or the facts or resulting from his confusion (TR 1), the Court, upon which falls the responsibility of correctly instructing the jury as to the law, ought not be confused or mistaken in its conceptions of the law, otherwise a jury must necessarily deliberate without the guidance of law.

The Court instructed the jury, that to convict, the government must prove that the defendant was employed by a *governmental agency*, namely the *Alaska Railroad*. What the Court should have stated was that the jury, in order to convict under Section 284, would have to find that the defendant was employed by an *agency of the United States*. Section 284 makes no reference to employment by a *governmental agency*. A governmental agency, as such, means nothing because government exists on many levels. This instruction fails to differentiate, or to state that by the term “governmental agency” it meant an agency of the United States.

This misleading and defective instruction was not cured by the Court’s attempt to take judicial notice of the status of the Alaska Railroad.

The Assistant U.S. Attorney during the examination of one John Manley, Assistant General Manager of

the Alaska Railroad, urged the Court to take judicial notice that the "Alaska Railroad is a governmental agency." (TR 74, line 21.) This the Court declined to do. (TR 74, line 24.) However, when the Court instructed the jury it said:

"You are instructed as a matter of law that the Alaska Railroad is a *governmental agency* within the meaning of the above quoted statute." (Emphasis added.)

Such an instruction is meaningless because the phrase "governmental agency" is a loose term without identification. The additional phrase contained in the instruction "within the meaning of the above quoted statute" does not sufficiently identify or instruct because the phrase "governmental agency" is not to be found in the statute. Whatever the Alaska Railroad is, it is not a *governmental agency*. Judicial notice could be taken that it is a railroad system, carrying goods and passengers as a common carrier, engaged in interstate commerce, for profit, in competition with other common carriers engaged in passenger and freight carriage, and is owned by the United States.

The Court instructed the jury in Instruction No. 3, sub-paragraph 2, that the government must prove beyond a reasonable doubt that "the defendant prosecuted or acted as counsel, attorney, or agent for prosecuting a claim against the United States." In this connection the government did prove, and the defendant did admit, that he did, on or about the 22nd day of March, 1952, join another attorney in filing a com-

plaint under the Federal Tort Claims Act. There was, however, a complete failure of proof as to the third point which the Court instructed the jury the government was required to prove.

In support of this contention the following facts are set forth:

The government showed by its evidence that the defendant was a train dispatcher. That on the day of the collision he was working the afternoon and evening trick in the dispatcher's office. The evidence further showed that on that afternoon, the movement of trains on the Alaska Railroad was controlled by two dispatch boards or control boards. The north board controlled the movement of trains between Curry (halfway point) and Fairbanks (last station north). The south board controlled the movement of trains between Curry (halfway point) and Seward (last station south). Anchorage, location of the dispatcher's office, and Rainbow, scene of the collision, came within the territorial limits of the south board. (TR 93.)

The evidence further showed that the defendant was working a combined job, i.e., Assistant Chief Dispatcher and dispatcher in charge of the north board. (TR 96, 156.)

Mr. Kerwin Frank called by the prosecution testified as follows (TR 155):

“Q. Mr. Frank, would you tell the court and jury what part Mr. Shaw took in directing that Extra 562 South and back into Anchorage?

A. Well, any part that Mr. Shaw took in bringing Extra 562 back to Anchorage was by my own request because of my physical sickness which was caused by the information I received and because of my mental—I was mentally perturbed—I asked him to bring the train back and he issued the orders for the train to return.

The Court. I take it then you were working the south board?

A. I was a dispatcher on duty on the south board between Curry and Seward.”

Mr. Frank further testified as follows:

“The Court. I think the witness has testified he was working the south board and Mr. Shaw was working the north board. Now, you may inquire along those lines. That would be proper cross-examination.

Mr. Rader. Well, that is what I was meaning to do. If I did something else I didn't mean to.

The Court. You may proceed then.

By Mr. Rader. Q. Mr. Frank, who did receive the first notice of the accident?

A. I did.

Q. I want you to tell us now exactly what happened at that time.

A. Well, a man came on the phone and asked for a dispatcher. I answered him and he said there had been an awful bad accident. That there were dead men laying all over the right-of-way and that they were putting them in the baggage car. They were backing back to Rainbow and wanted orders to return to Anchorage. They would be ready to leave in about 15 minutes. I became physically sick and mentally perturbed and I asked Mr. Shaw to take over.

Q. I want to ask you, whose responsibility was it to bring the train back to Anchorage?

A. That was my responsibility."

And again Mr. Frank testified as follows:

"Juror. When you became sick, wasn't it the Assistant Chief dispatcher's job to take over?

A. No.

Juror. I was just trying to get it straight in my own mind.

A. Mr. Shaw informed me that it was my responsibility to return the Passenger Extra 562 north to Anchorage and then it was a rule of the Railroad that only one dispatcher would issue train orders on any shift and that I would be in violation of the rules if I allowed him to do so, but I felt that because of his greater experience and my 5 months as a dispatcher—I compared them both and the physical feeling I had inside and the mental feeling I had in my head—I felt that he could better serve the interest of the Railroad and especially the people who were dead or injured. I don't think that Mr. Shaw necessarily had to do it. I could have done it, but it would have taken a little longer."

From the government's evidence on this point and giving it the best possible weight, we must conclude that some 24 miles south of Anchorage on the main line track of the Alaska Railroad a train was moving south under a train order and a motor car pulling man-haul cars was moving north, operated by a private contractor's employee (TR 1) who was under a duty not to operate except when the track was clear, and that the two movements met head on, resulting in

the injuries which were the subject of the Dushon claim. At the instant of impact the negligence which caused the collision and the injuries resulting from the collision were instantaneously effective.

When the news of the collision reached the dispatcher's office the *subject matter* of the Dushon claim was in existence and was frozen at the instant of the collision as to cause and effect. When the news reached the dispatcher's office the shock of dead and dying and the horror of mangled bodies so upset the dispatcher that he called on defendant, who left his position on the north board and promptly issued the necessary train order to back the train to Anchorage with the dead and injured aboard. The defendant subsequently made a report on the face of the dispatcher's sheet as to the incident. (TR 86.)

The action of the defendant, in response to an invitation of an incapacitated train dispatcher, in issuing the train order to bring back Extra 562 South, with the bodies of the dead and injured aboard was the only connection the defendant had with the accident as the government's evidence shows. All of the elements composing the Dushon claim were then in existence. The defendant's employment did not embrace any subject matter involved in the Dushon claim. The defendant had, prior to the accident and at the time of the accident, no direct connection with the movement of any train on the south board and had no direct connection with the movement of Extra 562 South. Defendant's duties were not directly or indirectly connected with the contractor's employee

who operated the gas car, and assuredly defendant's employment was not connected with the negligence which brought about the collision or the injuries suffered by Dushon and others. The *subject matter* of Dushon's claim, i.e., a right of compensation in the plaintiff, the negligence and the injuries, was in no way connected with defendant's employment, or in the issuance of the train order which returned the train and injured passengers to Anchorage.

In *Reed v. City of Muscatine*, 73 N.W. 579, the Court defined "subject matter of a claim" as follows:

"Within the rule that jurisdiction is the power to hear and determine the subject matter in controversy, the *subject matter* is the *right* which one party claims against another and demands judgment by the court upon. In an action for personal injuries it is the *right* which the plaintiff has for compensation for *injuries* received through the *negligence* of the defendant." (Emphasis added.)

The government failed, in presenting its evidence in chief, to prove that the defendant acted as attorney in the prosecution of a claim against the United States involving any *subject matter* connected with which the defendant was employed or performed duty.

The government likewise failed to prove that the defendant acted as attorney in the prosecution of a claim involving subject matter *directly connected* with which defendant was employed or performed duty.

The motion for judgment of acquittal should have been granted and the Court in failing to grant the same committed error.

The failure to grant the motion at the close of the trial for the same reasons was likewise error.

POINTS FOUR TO FOURTEEN.

Rule 30, Federal Rules of Criminal Procedure, provides that at the close of the evidence the judge shall instruct the jury on the *law* of the case.

This rule also provides that any party may submit written requests for instructions.

The Court, as we have previously noted in argument on Points Two and Three, erroneously instructed the jury on the subject of those elements of proof which were incumbent upon the government to prove. For the purpose of this argument we will restate the matter briefly.

The Court instructed the jury (TR 37) on the elements which the government was required to prove, and erroneously instructed that the government was required to prove that defendant was an employee of a *governmental agency*, namely the Alaska Railroad, and failed to instruct, that the government must prove that the defendant was employed by an *agency of the United States*.

These instructions were of course misleading. If the government had proved that defendant was an employee of a governmental agency, and the Alaska

Railroad had been owned by the Territorial Government, the jury under these instructions could have found defendant guilty in this case.

Instruction numbered 3, sub-paragraphs 1, 3 and 4, again refers to the *Alaska Railroad* and not to an *agency* of the *United States*. (TR 37, 38.) In fact, the Court instructed that the government would be required to prove that the claim involved subject matter directly connected with defendant's former employment or *service* with the Alaska Railroad. There is considerable difference between "service" and "performance of duty".

The further paragraph of Instruction No. 3 in which the Court instructed the jury that as a matter of law the *Alaska Railroad* is a *governmental agency*, within the meaning of the statute is misleading because the statute requires the defendant to have been employed by an *agency* of the *United States* and not by a mere unidentifiable governmental agency. The phrase "governmental agency" does not appear in the statute.

POINTS FOUR TO FOURTEEN CONTINUED.

The Court erred in failing to perform its function instructing the jury on the law, leaving the jury the responsibility of placing its own interpretation on a difficult and technical penal statute involving questions of law.

Section 284 is one of the most difficult and elusive statutes the writer of this brief has been called upon to analyze.

It requires constant effort to keep its various parts in order. It raises difficult questions of law in almost every line.

It involves such questions as:

(1) What is an agency of the United States?

(2) What does the word prosecute or prosecution mean? Does, to prosecute, apply to a person who lends his name to a complaint commencing a prosecution but withdraws before trial, or does prosecution mean a complete and full prosecution, from complaint to judgment?

(3) What is a claim against the United States? Judge McLaughlin demonstrated the difficulty with that term by utilizing many pages of opinion to define it. *Bergson* case, *supra*.

(4) What is the subject matter of a claim? Controversies have developed over the meaning of that phrase and judges have labored over definitions.

(5) What is meant by "directly connected with"?

(6) What is mean by the term "with which such person was employed or performed duty"?

All or most of these words, phrases and terms are difficult—yet the Court permitted this case to go to the jury of ordinary men and women, businessmen, laborers and housewives, *without a word of guidance in the instruction as to what these words, phrases, or terms meant in law and in fact*, or as they might be applied to this defendant.

Counsel for defendant took exception to the Court's instructions, among other reasons, because it left to

the jury the task of forming its own appraisals of those technical questions involving points of law. (TR 243.)

Counsel for defendant offered several instructions which would have furnished guidance to the jury on the difficult words, phrases and terms of the statute but the Court rejected each one.

Defendant's proposed Instruction No. 1 defined "subject matter." (TR 33.)

Defendant's proposed Instruction No. 2 defined the phrase "directly connected with", furnishing citations of authority. (TR 33.)

Defendant's proposed Instruction No. 3 pertained to the defendant's emergency service in taking over the south board of the truck dispatcher's office at the request of the dispatcher and ordering the train returned to Anchorage, bringing in the injured persons and arranging for medical care and hospitalization, and showed that this act was subsequent to the time the right of the injured to prosecute a claim, i.e., the time the negligence and the injuries came into existence, or, in other words, after all the elements of the claim were in existence. The act of defendant in issuing the train order to move the train back to Anchorage and secure aid for the injured had nothing whatever to do with the claim. The performance of this act did not involve any feature or element of the "Claim."

The Court's rejection of these proposed instructions was error.

It is interesting to note that although the Court referred to “governmental agency” in its instructions and not to an agency of the United States, as it should have done, that during the entire case in chief the prosecution attempted to prove that the Alaska Railroad was a “governmental agency” and attempted to have the Court take judicial notice that the Alaska Railroad was a “governmental agency” and nowhere in the trial of this case did the prosecution refer to the Alaska Railroad as an agency of the United States. The Alaska Railroad is not a “governmental agency” and probably is not an agency of the United States. It is a railroad system built with public monies, operated competitively in the freight and passenger field, is maintained as to equipment and operation under railroad rule books and in accordance with regulations of railroads in the United States. Most of its personnel are unionized in the four railroad brotherhoods and other national unions. As we said before, it is not a governmental agency within the meaning of that phrase as it has been judicially defined in numerous decisions annotated in West Publishing Company’s “Words and Phrases”.

CONCLUSION.

In conclusion we urge that the judgment of conviction be reversed on the grounds that the information did not sufficiently charge the defendant with a violation of Section 284, Title 18, USC; that Sections 100, Title 5 and 119, Title 41, USC, as consolidated in

Section 284, did not create new offenses or change the substantive law and therefore did not apply to claims in tort; that the subject matter which the Dushon claim involved had no connection, either direct or indirect, with the defendant's employment; that the Court's instructions were erroneous because they incorrectly outlined the burden of proof resting on the government by referring to "governmental agency" and not to an agency of the United States, and further instructed so inadequately that the jury had no guide as to the technical terms of the statute and thus its meaning and intent; that the Court's rejection of defendant's proposed instructions, while failing to instruct along similar lines, was error; and for other reasons arising in justice and equity.

Dated, Anchorage, Alaska,
May 21, 1956.

Respectfully submitted,
HAROLD J. BUTCHER,
Attorney for Appellant.

No. 14,568

United States Court of Appeals
For the Ninth Circuit

JOHN D. SHAW,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

On Appeal from the District Court for the District of Alaska,
Third Division.

BRIEF FOR APPELLEE.

WILLIAM T. PLUMMER,

United States Attorney,

LLOYD L. DUGGAR,

Assistant United States Attorney,

Anchorage, Alaska,

Attorneys for Appellee.

FILE

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PAUL P. O'BRIEN,

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United States Court of Appeals For the Ninth Circuit

JOHN D. SHAW,

VS.

UNITED STATES OF AMERICA,

Appellant,

Appellee.

On Appeal from the District Court for the District of Alaska,
Third Division.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

Appellant was convicted, after a jury trial in the District Court for the District of Alaska, Third Judicial Division, at Anchorage, Alaska, the Honorable J. L. McCarrey, Jr. presiding, of a violation of Title 18 U.S.C.A. Sec. 284. The Court imposed a fine of One Hundred (\$100.00) Dollars. The execution of the sentence has been stayed and from the judgment of conviction he has now appealed. Jurisdiction below was conferred by 48 U.S.C.A. 101. Jurisdiction in this Court is conferred by 28 U.S.C.A. 1291.

STATEMENT OF FACTS.

The Statement of Facts in appellant's brief is substantially correct, however the following dates should be noted.

On November 15, 1951 appellant resigned from the Alaska Railroad. He then held a position as Assistant Chief Dispatcher.

On March 22, 1952 appellant's name was subscribed to the complaint in the case of *Dushon, et al. v. The United States*, a tort claims case in which plaintiffs demanded judgment totalling approximately one and one-half million dollars.

On August 27, 1952 a formal association of attorneys was filed by the counsel for plaintiffs in the *Dushon* case. That association of attorneys was signed by Mr. Butcher, Mr. Grigsby and the appellant.

On September 5, 1952 an amended complaint was filed in the *Dushon* case and appellant's name appeared as one of the attorneys for plaintiffs.

It should be noted that according to the testimony the appellant had access to all the records in the Dispatcher's office. (TR 88 and TR 221.) In addition appellant made a report of the accident in his capacity as Assistant Chief Dispatcher. (TR 84.) The testimony also included evidence that the appellant as Assistant Chief Dispatcher was in a position of authority in the office of the Dispatcher.

ARGUMENT.

I.

THE INFORMATION ADEQUATELY CHARGES THAT THE DEFENDANT WAS AN EMPLOYEE OF AN AGENCY OF THE UNITED STATES.

Appellant challenges the sufficiency of the information on which he was tried and convicted. He now contends that the allegation that the defendant was employed by the Alaska Railroad, without describing the railroad as an agency of the United States, is a fatal defect and that the information does not therefore state an offense against the United States. The wording of the information on this point is as follows:

“That on March 24, 1950, the said John D. Shaw was employed by the Alaska Railroad, a Government agency, as an Assistant Chief Dispatcher.” (TR 1.)

Appellant not only contends that the information itself is defective since it fails to allege that the Alaska Railroad is an agency of the United States (Appellant's Brief 7), but he further contends that the Alaska Railroad is probably not an agency of the United States. (Appellant's Brief 45.) In support of his contentions the appellant has failed to give a citation of authority. The Alaska Railroad was created by Congress. (See 48 U.S.C.A. 301 through 308.) It has specifically been held to be an agency of the United States by this Court. *Berger v. Ohlson et al.*, 120 F.2d 56; *Ballaine v. Alaska Northern Railroad Co.*, 259 F. 183. This is a matter of which the Court will take judicial notice. *Hill v. United States*, 275 F. 187.

Appellant further contends that the information is insufficient in that it does not charge that the appellant acted as counsel, attorney, or agent in prosecuting a claim against the United States involving a subject matter directly connected with which the defendants was employed or performed duties. (Appellant's Brief 78.) The information charges:

"That on March 24, 1950, the said John D. Shaw was directly connected with and performed duties relating to an accident which occurred at or about 5:15 P.M. on said day when Extra Train No. 562 South, of the Alaska Railroad came into collision with a gas car and trailers attached, operated by a Government contractor, at or near Rainbow at Mile 91.7 on the Alaska Railroad.

That between the dates of March 24, 1950 and March 22, 1952, said period being within two years of the date when the said John D. Shaw left the employ of the Alaska Railroad, the said John Shaw acted as counsel and agent for plaintiffs in the preparation of a suit against the United States on behalf of persons injured in the aforementioned accident.

That from March 22, 1952 until January 20, 1953, said period being within two years of the date when the said John D. Shaw left the employ of the Alaska Railroad, the said John D. Shaw acted as attorney and agent for plaintiffs in the case of George Dushon et al. v. United States, Civil No. A-7605, a suit against the United States brought by the said John D. Shaw and others on behalf of various persons who sustained injuries in the aforementioned accident on March 24, 1950."

The allegations relating to the defendant's performance of duties as Assistant Chief Dispatcher for the railroad at the time of the collision and relating to his acts as counsel and agent, within two years after separation from the railroad's employ, in the preparation and prosecution of a proceedings against the United States on behalf of persons injured in the collision, *necessarily import* the meaning that the defendant prosecuted as counsel and agent a claim against the United States involving subject matter with which he was connected or performed duty as an employee of the United States within two years following a separation from such employment, as prohibited by the statute. Since the necessary portent of the language used substantially charges an offense under Section 284 of Title 18 U.S.C.A., the information is sufficient even though it does not precisely follow the statutory language.

Tatum v. United States, 110 F. 2d 555;

Stumbo v. United States, 90 F. 2d 828, cert. den., 302 U.S. 755;

Capone v. United States, 56 F. 2d 927, cert. den., 286 U.S. 553.

If the essential averments can by a fair construction be found in the text, the information, even though faulty in form, is valid.

Craig v. United States, 81 F. 2d 816, cert. den., 298 U.S. 637.

Since the information adequately apprised the defendant of the nature of the charge he had to meet, it will permit him to plead former jeopardy in the

future, and it sufficiently meets the test as to its validity.

United States v. Josephson, 165 F. 2d 82, cert. den., 333 U.S. 838;

Carter v. United States, 173 F. 2d 684, cert. den., 337 U.S. 946;

Robertson v. United States, 168 F. 2d 294.

The information though faulty in form should be sustained because it adequately charges the defendant with the offense under Title 18 U.S.C.A. 284.

II.

APPELLANT'S CONTENTION THAT TITLE 18 U.S.C.A. 284 DOES NOT EXTEND TO CLAIMS AGAINST THE UNITED STATES SOUNDING IN TORT IS WITHOUT MERIT.

Appellant labors to achieve a statutory interpretation of Sec. 284 Title 18 which will exclude from that section claims against the United States sounding in tort. The statutory language is clear:

“Whoever, having been employed in any agency of the United States, including Commissioned Officers assigned to duty in such agency, within two years after the time when such employment or service has ceased, prosecutes or acts as counsel, attorney, or agent for prosecuting, *any claims against the United States involving any subject matter directly connected with which such person was so employed or performed duties * * **” (Emphasis supplied.)

As a general rule Courts will not interpret a statute in an unreasonable manner. Title 18 U.S.C.A. 284

has been judicially construed in the case of the *United States v. Bergson*, 119 Fed. Sup. 459. This decision is from the United States District Court for the District of Columbia and has been cited by the appellant as authority for the proposition that tort claims are not within the statute. The reading of the *Bergson* case does not lead to that conclusion. In *Bergson* the defendant had been prosecuted for violation of Title 18 U.S.C.A. 284 on the following set of facts. The defendant had been in the employ of the Department of Justice. Within two years after leaving Government employment he appeared as counsel in behalf of the Minnesota Mining and Manufacturing Co. and the Carborundum Co. and sought to obtain from the Department of Justice for his clients a clearance letter from the Anti-trust Division of the Department. The second count of the indictment charged that the defendant sought to obtain for the United States Pipeline Co. an Anti-trust clearance letter from the Department of Justice. At the trial the defendant moved for a judgment of acquittal and was successful. The District Judge passed upon the meaning of the terms "claims against the United States" as used in Title 18 U.S.C.A. 284. Judge McLaughlin found that the term "claims against the United States" was intended to cover or embrace claims against the United States Government *for money or for property*.

A reading of the Tort Claims Act, Title 28 U.S.C.A. 1346, indicates that Congress has established the Government's liability for the negligent acts of its employees in plain terms as follows:

“Subject to the provisions of Chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court for the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on or after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment. * * *”

The contention urged by appellant would lead to an absurd result. The statute would not in effect, if appellant is correct, mean what it plainly states.

There can be little doubt that the action brought again the United States in the *Dushon* case, by those injured in the railroad collision at Rainbow were claims for money within the purview of Title 18 U.S.C.A. 284.

The appellant's argument that a ruling finding a tort claim within the scope of Section 284 of Title 18 would operate to make it an offense for former Government employees to prosecute tort claims in their own behalf for injury sustained in the course of their employment is frivolous. The statutory prohibition is against the prosecution of claims by a former employee “as counsel, attorney or agent for another”, and not against the prosecution of a claim in his own behalf.

III.

APPELLANT'S CONTENTION THAT THE UNITED STATES FAILED TO PROVE THAT THE DEFENDANT ACTED AS ATTORNEY IN THE PROSECUTION OF A CLAIM AGAINST THE UNITED STATES INVOLVING SUBJECT MATTER CONNECTED WITH WHICH HE WAS EMPLOYED OR PERFORMED DUTY IS UNSOUND.

Appellant suggests that Section 284 of Title 18 U.S.C.A. is not applicable to him because it prohibits former Government employees from post-employment prosecutions of claims against the United States only when the employees had previously been connected with the claim which was pending at the time of his employment. The statute contains no such limitation. It clearly prohibits the prosecution of claims by a former employee who has acted as attorney, counsel or agent "involving any subject matter directly connected with which such person was so employed or performed duty". In plain meaning the statute simply condemns one from acting as counsel, agent or attorney in any subject matter with which the employee performed duties. It is clear that the appellant had been connected at the time of his employment as a train dispatcher with the "subject matter" which gave rise to the claim which he later prosecuted as attorney. (TR 154, 155.)

IV.

APPELLANT'S CONTENTION THAT HE WAS NOT IN POSSESSION OF INFORMATION WHICH WAS CONFIDENTIAL OR WHICH MIGHT BE USED DETRIMENTALLY AGAINST THE UNITED STATES IS WITHOUT MERIT.

This is of course an effort by the appellant to again limit the application of Section 284 of Title 18 U.S.C.A. The statute contains no such limitation and if such limitation was construed to be in the statute it would lead to a rather absurd result. The purpose of the statute is clearly set out. Appellant alleges that he had no information, confidential or otherwise, that was not known to every person that read the newspapers or listened to the radio. (Appellant's Brief 19.) The fallacy of this reasoning is of course apparent since the United States could hardly be in a position to show whether or not appellant had information which was confidential or otherwise. Nor is this an element which the United States is required to prove under Section 284 Title 18 U.S.C.A. It would be unreasonable to require the United States in addition to the other requirements set forth in Section 284 to prove that the appellant had confidential information which might aid in the assistance of preparation of a claim against the United States. The contention that the United States in prosecution of this case failed to show that the defendant had access to information regarding the collision or that he furnished information to anyone regarding the collision is not valid. The records of the Alaska Railroad were certainly not readily available to the public. The statute says nothing about confidential information or that

the party in performing his duty must have access to certain classified and confidential information which would be of assistance to a claimant against the United States.

V.

THE COURT'S INSTRUCTIONS TO THE JURY WERE ADEQUATE.

Appellant's objection to the sufficiency of the instructions to the jury is without substance. The instructions should be taken as a whole and adequately cover the law of the case. The giving of additional instructions as requested by the appellant was within the discretion of the trial Court. *Allis v. U. S.*, 155 U.S. 117; *Allen v. U. S.*, 186 F. 2d 439; *Wilton v. U. S.*, 156 F. 2d 433.

VI.

THE EVIDENCE WAS SUFFICIENT TO SUSTAIN CONVICTION.

In considering the sufficiency of the evidence in reviewing the denials of appellant's motions for acquittal as well as the verdict and judgment of conviction, the Government is entitled to have the evidence and inferences reasonably to be drawn therefrom viewed in the light most favorable to the Government. *U. S. v. Horton*, 180 F. 2d 427 (7th Cir. 1950); *Ross v. U. S.*, 197 F. 2d 660 (6th Cir. 1952); *U. S. v. Schneiderman*, 106 F. Supp. 906; *U. S. v. Stoeher*, 100 F. Supp. 143, aff'd 196 F. 2d 276, 33 A.L.R. 2d 836, cert. den., 344 U.S. 826; *U. S. v. Thayer*, 209 F. 2d 534 (7th Cir. 1954); *Thomas v. U. S.*, 211 F. 2d 45, cert.

den., 347 U.S. 969 (D.C. Cir. 1954); *Las Vegas Merchant Plumbers' Ass'n v. U. S.*, 210 F. 2d 732 (9th Cir. 1954), cert. den., 348 U.S. 817; *U. S. v. O'Brien*, 174 F. 2d 341 (7th Cir. 1949).

Without going into any detailed discussion of the evidence in the record, appellee respectfully submits that there is sufficient competent evidence to support both the verdict below and the trial Court's denials of the appellant's motions for acquittal.

CONCLUSION.

The trial Court did not commit error in denying appellant's motions for acquittal since there is sufficient evidence in the record to support each and every material allegation of the information. The information on which defendant was charged and convicted is sufficient to charge an offense under Title 18 U.S.C.A. 284. The appellant has failed to prove reversible error in the Court's instructions to the jury. The verdict of the jury is in accordance with the weight of the evidence and therefore should be sustained.

Dated, Anchorage, Alaska,
July 27, 1956.

Respectfully submitted,

WILLIAM T. PLUMMER,

United States Attorney,

LLOYD L. DUGGAR,

Assistant United States Attorney,

Attorneys for Appellee.

No. 14569

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy
for the Estate of F. P. Newport Corporation,
Ltd., Bankrupt, Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern
District of California, Central Division

FILED

JAN 6 1955

PAUL P. O'BRIEN,
CLERK

No. 14569

United States
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District of California, Central Division

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant U. S. Attorney,
EUGENE HARPOLE,
Special Attorney, Internal Revenue Service
600 Federal Building,
Los Angeles 12, California,
Hon. H. BRIAN HOLLAND,
Assistant U. S. Attorney General, and
ELLIS N. SLACK,
Special Assistant to Attorney General,
Dept. of Justice, Washington, D. C.

For Appellee:

BAILIE, TURNER, LAKE & SPRAGUE,
811 Citizens Natl. Bank Bldg.,
453 South Spring Street,
Los Angeles 13, California,
GEORGE BOUCHARD,
900 Statler Center,
900 Wilshire Boulevard,
Los Angeles 17, California. [1*]

* Page numbers appearing at foot of page of original Transcript of Record.

In the District Court of the United States, Southern
District of California, Central Division

In Bankruptcy No. 25308-M.

In the Matter of F. P. NEWPORT CORPORATION, LTD., Alleged Bankrupt.

CREDITORS' INVOLUNTARY PETITION
IN BANKRUPTCY

To the Honorable, the Judges of the Central Division of the United States District Court for the Southern District of California:

The petition of C. G. Kinsey, W. B. Halligan, and Hiram E. Casey, as Trustee of the Estate of Charles R. Stuart, a Bankrupt, respectfully shows and alleges:

I.

That at and during all the times herein mentioned the F. P. Newport Corporation, Ltd. was and is a corporation, and has had its principal place of business at 106 West 6th Street in the City of Los Angeles, County of Los Angeles, State of California for the greater portion of the six months next preceding the filing of this petition, and owes debts in the amount of One Thousand (\$1,000.00) Dollars and over, and the same is a commercial corporation doing a realty business, and is not a municipal, railroad, insurance or banking corporation or a building and loan association.

II.

That your petitioners are creditors of the said F. P. Newport Corporation, Ltd. having provable claims amounting in the aggregate in excess of securities held by them to the sum of Five Hundred (\$500.00) Dollars and more. That the nature and amounts of your petitioners' claims are as follows, to-wit: [2]

(a) The claim of your petitioner C. G. Kinsey is a balance due for work and labor performed and services rendered to the said Alleged Bankrupt at its special instance and request upon an open book account within four years last past in the sum of \$2,500.15 and accrued interest, which said sum the said Alleged Bankrupt promised and agreed to pay therefor, and that neither the whole nor any part of the said sum has been paid, and the whole thereof is now due, owing and unpaid from the said Alleged Bankrupt to the said C. G. Kinsey;

(b) The claim of your petitioner W. B. Halligan is a balance due for work and labor performed and services rendered to the said Alleged Bankrupt at its special instance and request upon an open book account within four years last past in the sum of \$613.32 and accrued interest, which said sum the said Alleged Bankrupt promised and agreed to pay therefor, and that neither the whole nor any part of the said sum has been paid, and the whole thereof is now due, owing and unpaid from the said Alleged Bankrupt to the said W. B. Halligan;

(c) The claim of your petitioner Hiram E. Casey

as Trustee in Bankruptcy for Charles R. Stuart, Bankrupt, is based upon a judgment procured by the said Hiram E. Casey as Trustee of the said Charles R. Stuart, Bankrupt, in the sum of \$766.97, which said sum was procured in the Municipal Court in the City of Los Angeles, County of Los Angeles, State of California, on the 12th day of June, 1934, in an action therein numbered 346125 wherein your said petitioner was the plaintiff and the said Alleged Bankrupt herein was the defendant; that no part of the said sum has been paid, and the whole thereof remains due, owing and unpaid.

III.

That the said Alleged Bankrupt, F. P. Newport Corporation, Ltd. is insolvent, and that within four months next [3] preceding the date of this petition and while insolvent the said F. P. Newport Corporation, Ltd. committed an act of Bankruptcy in this, that it did heretofore on or about the 15th day of March, 1935, transfer a portion of its property, to-wit, money in the sum of \$433.20 to a certain general unsecured creditor, to-wit, J. B. Gribble, with intent to prefer the said creditor over its other creditors in the same class, the payment of which said sum, as aforesaid, did then and there amount to a preference in favor of the said creditor.

Wherefore, your petitioner prays that service of this petition with the subpoena be made upon the said F. P. Newport Corporation, Ltd. as provided by the Acts of Congress relating to Bankruptcy,

and that it may be adjudged by the Court to be a Bankrupt within the purview of the said Act.

/s/ C. G. KINSEY,

/s/ W. B. HALLIGAN,

/s/ HIRAM E. CASEY,

as Trustee of the Estate of Charles
R. Stuart, Bankrupt.

/s/ HIRAM E. CASEY,

Attorney for Petitioning Creditors. [4]

Duly Verified. [5]

[Endorsed]: Filed March 19, 1935.

[Title of District Court and Cause.]

ADJUDICATION OF BANKRUPTCY AND ORDER OF REFERENCE

At Los Angeles, in said District, on the 12th day of January, A.D. 1937, before the Honorable Wm. P. James, Judge of said Court in Bankruptcy, the petition of C. G. Kinsey, W. B. Halligan and Hiram E. Casey, as Trustee of the Estate of Charles R. Stuart, a Bankrupt, that F. P. Newport Corporation, Ltd., a corporation, be adjudged a bankrupt, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered, the said F. P. Newport Corporation, Ltd., a corporation, is hereby declared and adjudged a bankrupt accordingly.

It Is Therefore Ordered, That said matter be re-

ferred to E. R. Utley, Esq., one of the Referees in Bankruptcy of this Court, to take such further proceedings therein as are required by said Acts; and that the said F. P. Newport Corporation, Ltd., shall attend before said Referee on the 19th day of January, at Los Angeles, and thenceforth shall submit to such orders as may be made by said Referee or by this Court relating to said involuntary bankruptcy.

Witness the Honorable Wm. P. James, Judge of the said Court, and the seal therof, at Los Angeles, in said District, on the 12th day of January, A.D. 1937.

[Seal]

R. S. ZIMMERMAN,

Clerk

/s/ By M. R. WINCHELL,

Deputy Clerk

[6]

[Endorsed]: Filed January 12, 1937.

[Title of District Court and Cause.]

ORDER APPROVING APPOINTMENT OF TRUSTEE

At Los Angeles, Calif., in said district, on the 20th day of November, 1950, Paul W. Sampsell, of Los Angeles, Calif., having been appointed trustee of the estate of the above named bankrupt by the creditors of said bankrupt, as provided in the Act of Congress relating to bankruptcy,

It Is Ordered that the appointment of said Paul

W. Sampsell, as trustee be, and it hereby is, approved, and the amount of his bond is fixed at \$15,000.00 dollars.

/s/ HUGH L. DICKSON,

Referee in Bankruptcy [7]

[Title of District Court and Cause.]

PETITION FOR ORDER OF LIQUIDATION

The petition of Paul W. Sampsell, Trustee in Bankruptcy of the above entitled estate, respectfully represents to the Court:

1. That the assets of said estate consist of real and personal properties set forth in Exhibit A, Exhibit B and Exhibit C attached hereto and hereby referred to and made part hereof.

2. That the following described real property:

That portion of the Rancho Los Cerritos in the City of Long Beach, County of Los Angeles, State of California, described as follows:

Beginning at the most Southeasterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in book 5577 page 105 of Deeds, Records of Los Angeles County, in the Northwesterly line of Channel No. 3 of Long Beach Harbor; thence along the southeasterly line of the land described in said deed, North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 500 feet; thence South $19^{\circ} 42' 30''$ West 738.08 feet to a point in said Northwesterly line of Channel No. 3;

thence along said Northwesterly line South 64° 42' 30" West 500 feet to the point of beginning; was transferred to Security-First National Bank of Los Angeles, pursuant to an order and decree approving compromise dated and filed herein March 26, 1951, free and clear of all claims, liens, encumbrances, conditions, restrictions, reservations, easements and rights of way except as set forth in that certain deed from Paul W. Sampsell as Trustee in Bankruptcy of the estate of F. P. Newport Corporation, Ltd., dated November 27, 1951, recorded December 14, 1951, in Book 37853 page 39 of Official Records of Los Angeles County, California, to which deed reference is hereby made for further particulars.

3. That the annual income coming to the estate from all sources does not exceed the sum of \$35,000, principally from oil royalties; that most of the real property belonging to the estate produces no income.

4. That the annual state and county taxes amount to approximately \$9,810.00; that the ordinary administration expenses of said estate are approximately \$12,000.00 per annum.

5. That the claims of the general unsecured creditors of said estate are 50 in number and aggregate in amount approximately \$194,000.00, and that no dividend has been paid on said claims.

6. That the amount of accumulated and unpaid expenses of administration herein is approximately \$100,000.00 (to 12/31/51).

7. That the above estate has been pending in this

court since March 19, 1935, and that it was adjudicated on January 12, 1937, and ever since has been under trusteeship.

8. That prior to on or about December 14, 1951, when the compromise referred to in paragraph 2 hereof was consummated, it was impracticable to liquidate the assets of said estate for the reason that most of the assets stood in the name of Security-First National Bank of Los Angeles as security for a loan evidenced by a certain [87] deed of trust known as Trust D-7224, a copy of which is on file in this court and is hereby referred to for further particulars. That at the inception of said bankruptcy proceeding the unpaid amount of said loan was in excess of \$1,351,000 and that pursuant to the provisions of said deed of trust the prices and terms of sale of each parcel of real property covered thereby required the approval of said Bank and the execution by said Bank of deeds to purchasers.

9. That pursuant to an Order and Decree of this Court dated and filed on March 26, 1951, approving a compromise between petitioner as Trustee herein and said Bank, the encumbrance upon the property of the estate held by said Bank has been discharged and the assets covered by said encumbrance have been deeded and transferred to petitioner as Trustee herein and said properties are now free of encumbrance.

10. That petitioner is informed and believes and therefore alleges that this bankrupt estate was at its inception, continued to be and now is insolvent and

in the opinion of petitioner the continued operation of this estate by petitioner as Trustee herein is not in the best interests of the creditors hereof and others interested herein, but that said estate should be liquidated as speedily as possible and the proceeds paid out to defray the cost of administration, taxes and other expenses and the remainder paid to the unsecured creditors hereof.

11. That heretofore on November 23, 1942, in a certain action entitled *United States vs. Metcalf*, then pending before the United States Circuit Court of Appeals, Ninth Circuit, (131 Fed. (2d) 677), the said Court held that because the Trustee as Lessor herein leased two parcels of land to Universal Consolidated Oil Company as Lessee, executed community oil leases with Bankline Oil Company, Lessee, pending sales thereof, of unsubdivided lands, granted easements and rights of way to the City of Los Angeles and County of Los Angeles for street purposes, made sales of real property, cancelled [88] leases of real property, made payments upon the indebtedness of the bankrupt, compromised claims against the bankrupt, entered into agreements with the City of Long Beach, California, concerning right to oil and gas produced under the Universal Consolidated Oil Company lease, pending determination of title disputes to the property covered by said lease, renewed contracts with Oil Field Testing and Engineering Company, Inc. for checking of oil and gas production on said property, and leased a barn belonging to the bankrupt for the storage of hay, the said activities constituted the

“doing business of a corporate nature” and that the bankrupt estate was liable for the payment of corporate income tax under the provisions of 26 U.S.C.A. Int. Rev. Code section 52.

12. That the transactions outlined in paragraph 11 of this petition, other than collecting royalties from Universal Consolidated Oil Company and from another oil lease on one lot which brings in about \$5 per month have completely ceased; and the administration of the estate is now practically at a stand-still; that the clearing of the title to the real property of the estate from the encumbrance of Security-First National Bank of Los Angeles makes it feasible, in the opinion of petitioner, to liquidate the estate, sell the assets at public auction, pay the expenses of administration and other prior claims and distribute the residue ratably among the general creditors, and close the estate.

13. That in the opinion of petitioner the prompt sale of the assets of said estate, and the distribution of the proceeds thereof according to law are for the best interests of the estate and of all those interested therein.

Wherefore Petitioner Prays: That a time may be fixed for the hearing of this petition; that notice of the time and place of said hearing be given to the creditors of said estate according to law; and that, at the hearing hereof the Court, by its order, direct petitioner as Trustee herein henceforth not to operate the business [89] of the bankrupt, but to sell the assets hereof at public auction for cash either in bulk or in parcels as the Court may direct,

to liquidate the estate and convert its assets into money, or to take such other action as to the Court may seem proper in the premises.

/s/ PAUL W. SAMPSELL,
As Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., Petitioner.

BAILIE, TURNER & LAKE,
/s/ By NORMAN A. BAILIE,
Attorneys for said Trustee. [90]

EXHIBIT "A"

Paul W. Sampsell, Trustee in Bankruptcy for
F. P. Newport Corporation, Ltd.

INVENTORY OF REAL PROPERTIES

March 31, 1952

All That Real Property situated in the County of Los Angeles, State of California, described as follows:

Parcel 1

Lot 1791½ of Tract 250, in the City of Glendale, as per map recorded in Book 15, Pages 130 and 131 of Maps, in the office of the County Recorder of said County, Except that portion described as follows:

Beginning at the most Northeasterly corner of said Lot, thence South 8° 45' West, along the Easterly line of said Lot, 135 feet; thence Northwesterly, parallel with the Northerly line of said lot 120 feet to a point; thence South 85° 05' West 31.01 feet, more or less, to the Westerly line of said Lot;

Exhibit "A"—(Continued)

thence North $8^{\circ} 45'$ East along the Westerly line of said lot to the Northerly line of said Lot; thence Easterly on said Northerly line to the point of beginning.

Parcel 2

Lot $180\frac{1}{2}$ of said Tract No. 250, Except that portion described as follows:

Beginning at the Northwest corner of said lot, thence along the Westerly line of said lot South $8^{\circ} 43' 15''$ West 162.77 feet to a point on a tangent curve concave Southerly having a radius of 66.91 feet, a radial line from said last-mentioned point bears South $1^{\circ} 12' 15''$ West; thence Easterly along said curve 23.60 feet; thence South $68^{\circ} 35' 20''$ East 37.69 feet to the point of beginning of a tangent curve concave Northerly having a radius of 44.16 feet; thence Easterly along said curve 36.57 feet; thence North $63^{\circ} 57' 40''$ East 8.78 feet to the point of beginning of a tangent curve concave Southerly having a radius of 91.01 feet; thence Easterly along said curve 20.15 feet to an intersection with a line drawn parallel with the Westerly line of said lot distant 120.00 feet measured along the Northerly line of said lot from the Northwest corner thereof, a radial line from said curve at its point of intersection with said parallel line bears South $13^{\circ} 21' 15''$ East; thence North $84^{\circ} 05'$ East 31.01 feet, more or less, to the Easterly line of said lot; thence along the Easterly line of said lot North $8^{\circ} 43' 45''$ East to the Northerly line of said lot; thence along the

Exhibit "A"—(Continued)

Northerly line North $81^{\circ} 16' 15''$ West to the point of beginning.

Parcel 3

Lot 181½ of said Tract No. 250, Except that portion described as follows:

Beginning at the Northeast corner of said lot; thence along the Easterly line of said lot South $8^{\circ} 43' 45''$ West 162.77 feet to a point on a tangent curve concave Southerly having a radius of 66.91 feet, a radial line from said last-mentioned point bears South $1^{\circ} 12' 15''$ West; thence Westerly along said curve 38.54 feet; thence South $58^{\circ} 12' 10''$ West 21.05 feet to the point of beginning of a tangent curve concave Northerly and having a radius of 92.98 feet; thence Westerly along said curve 43.94 feet; thence South $85^{\circ} 16' 40''$ West 10.71 feet to the point of beginning of a tangent curve concave Northerly and having a radius of 103.83 feet; thence Westerly along said curve 20.30 feet to a point from which a radial line bears North $6^{\circ} 28' 55''$ East; thence North [91] $8^{\circ} 43' 45''$ East parallel with the Easterly line of said lot 216.95 feet to the Northerly line of said lot; thence South $81^{\circ} 16' 15''$ East 120 feet to the point of beginning.

Parcel 4

Laurita Place Vacated, adjacent to Lot 181½ of Said Tract No. 250.

Parcel 5

Lots 184, 186, 188, 189, 193, and 194 of said Tract No. 250.

Exhibit "A"—(Continued)

Parcel 6

Those portions of Lot 185 of said Tract No. 250, described as follows:

(A) All of said Lot 185 Except that portion thereof lying Northeasterly of a line drawn from the Southeast corner of Lot 178½ to the most Northerly corner of Lot 186, Tract 250.

(B) An easement for street and road purposes and installation and maintenance of public utilities over a strip of land 50 feet wide in said Lot 185, the center line of said 50 foot strip being described as follows:

Beginning at a point in the South line of Colina Drive distant thereon North 75° 50' West 39.38 feet from the Northeast corner of said Lot 185, said point being the beginning of a non-tangent curve concave to the Northwest, having a radius of 566.50 feet, a radial line through said point having a bearing of North 47° 57' West; thence Southwesterly along said curve 175.79 feet, more or less, to a point in a line drawn from the Southeast corner of Lot 178½ to the most Northerly corner of Lot 186, Tract 250, distant thereon South 59° 11' 25" East 178.56 feet from the Southeast corner of Lot 178½ of said Tract 250. A radial line through said point bears North 30° 10' 15" West. The side lines of said easement to be prolonged or shortened to intersect the South line of Colina Drive and the said line hereinbefore described.

Parcel 7

Lots 190 and 192 of said Tract No. 250, and

Exhibit "A"—(Continued)

the South half of Colina Drive vacated, adjacent thereto.

Parcel 8

Lot 191 of said Tract No. 250, and the South and Westerly one-half of vacated portion of Colina Drive adjacent, except those portions thereof included within the lines of the following described parcel:

Beginning at the Northwest corner of Lot 13 of Tract No. 250, thence along the prolongation of the North line of said Lot 13, South $88^{\circ} 36'$ West [92] 52.98 feet; thence South $39^{\circ} 07'$ East 64.08 feet to the beginning of a curve concave to the Southwest having a radius of 285.47 feet; thence Southeasterly along said curve 49.49 feet to an angle point in the Westerly line of said Lot 13 distant North $29^{\circ} 11'$ West 54.21 feet from the Southwest corner of said Lot 13; thence Northerly along the Westerly line of said Lot 13, 93.79 feet to the point of beginning.

Parcel 9

Lot 195 of said Tract No. 250, Except that portion described as follows:

Beginning at the most Southerly corner of said lot thence North $23^{\circ} 30' 03''$ West 93.12 to a line drawn parallel with the most Southerly line of said lot and Northerly therefrom 75.00 feet, measured at right angles; thence North $77^{\circ} 09'$ West 230.83 feet along said parallel line; thence South $34^{\circ} 38' 18''$ West 80.77 feet to the Southwesterly corner of said lot; thence along the Southerly line of said

Exhibit "A"—(Continued)

lot South $77^{\circ} 09'$ East 315.90 feet to the point of beginning.

Parcel 10

Lot 16 of Tract No. 2052, Sheets 1 and 2, in the City of Los Angeles, as per map recorded in Book 28, Pages 67 and 68 of said Map Records.

Parcel 11

Lots 6, 7, and 20 of Tract No. 4044, in the City of Glendale, as per map recorded in Book 43, Page 79 of said Map Records.

Parcel 12

Lots 32, 33, 34, 40, 43, 44, 45, 46, 47, 48, 49 and 50 of Tract No. 6409, in the City of Glendale, as per map recorded in Book 114, Pages 3 and 4 of said Map Records.

Parcel 13

That part of Lot 5 of Tract No. 7146, in the City of Glendale, as per map recorded in Book 76, Page 15 of said Map Records, described as follows:

Beginning at a point in the Northerly line of said Lot 5, distant North $88^{\circ} 36'$ East 40.00 feet from the Northwest corner of said Lot 5; thence South $3^{\circ} 09'$ East parallel with the Westerly line of said Lot 5, a distance of 91.69 feet to a point on the Southerly line of said Lot; thence North $83^{\circ} 51' 10''$ East along said Southerly line 64.88 feet to the Southeast corner of said lot; thence North $13^{\circ} 31' 20''$ West along the Easterly line of said lot, a distance of 72.08 feet to the point of beginning of a curve concave Southwesterly having a radius of 20 feet; thence Northwesterly along said curve a dis-

Exhibit "A"—(Continued)

tance of 27.18 feet to a point in the Northerly line of said Lot; thence South $88^{\circ} 36'$ West 32.77 feet to beginning. [93]

Parcel 14

That part of Lot 8 of said Tract No. 7146, described as follows:

Beginning at a point in the Northerly line of said Lot 8, distant North $83^{\circ} 51' 10''$ East 80.08 feet from the Northwest corner of said Lot 8; thence South $3^{\circ} 09'$ East, parallel with the Westerly line of said Lot 8, 83.66 feet to a point on the Southerly line of said Lot; thence South $89^{\circ} 39'$ East along said Southerly line 19.81 feet to the point of beginning of a curve concave Northwesterly and having a radius of 15 feet; thence Northeasterly along said curve a distance of 25.96 feet to a point in the Easterly line of said Lot; thence along the said Easterly line North $8^{\circ} 49' 10''$ West 23.20 feet to an angle point in said Easterly line; thence North $13^{\circ} 31' 20''$ West 47.40 feet to the Northeast corner of said Lot; thence South $83^{\circ} 51' 10''$ West 24.84 feet to the point of beginning.

Parcel 15

That part of Lot 9, of said Tract No. 7146, described as follows:

Beginning at the Southeast corner of said Lot 9; thence South $85^{\circ} 45' 30''$ West, along the Southerly line of said Lot, 50.82 feet; thence North $3^{\circ} 09'$ West, parallel with the Westerly line of said Lot, 108.92 feet to a point in the Northerly line of said Lot; thence South $89^{\circ} 39'$ East along said Northerly

Exhibit "A"—(Continued)

line 27.68 feet to the point of beginning of a curve concave Southwesterly, having a radius of 15 feet; thence Southeasterly along said curve a distance of 21.16 feet to a point in the Easterly line of said Lot; thence South $8^{\circ} 49' 10''$ East along said Easterly line, 89.73 feet to the point of beginning of a curve concave Westerly and having a radius of 212.80 feet; thence Southerly along said curve a distance of 3.50 feet to the point of beginning.

Parcel 16

That part of Lot 12 of said Tract No. 7146, described as follows:

Beginning at a point in the Northerly line of said Lot 12, distant North $85^{\circ} 45' 30''$ East 79.98 feet from the Northwest corner of said Lot; thence South $3^{\circ} 09'$ East parallel with the Westerly line of said Lot, 90.37 feet to a point in the Southerly line of said Lot, said point being situated on a curve concave Southerly and having a radius of 145.00 feet, a radial line from said point bearing South $9^{\circ} 36' 09''$ West; thence Easterly along said curve a distance of 20.85 feet to the point of beginning of a curve concave Northerly and having a radius of 15 feet; a radial line from said point bearing North $17^{\circ} 49' 20''$ East; thence Easterly along said curve a distance of 23.97 feet to a point in the Easterly line of said Lot, said point being the point of beginning of a curve concave Westerly and having a radius of 212.80 feet, a radial line from said point bearing North $73^{\circ} 43' 21''$ West; thence Northerly along said curve a distance of 89.71 feet to the

Exhibit "A"—(Continued)

Northeast corner of said Lot; thence South $85^{\circ} 45' 30''$ West 50.82 feet to the point of beginning. [94]

Parcel 17

That part of Lot 13 of said Tract No. 7146, described as follows:

Beginning at a point on the Southerly line of said Lot 13, distant North $88^{\circ} 36'$ East 40.00 feet from the Southwest corner of said Lot; thence North $3^{\circ} 09'$ West parallel with the Westerly line of said Lot, 125.64 feet to a point in the Northerly line of said Lot, said point being situated on a curve concave Southerly and having a radius of 115.00 feet, a radial line from said point bearing South $7^{\circ} 09' 33''$ East; thence Easterly along said curve a distance of 47.84 feet to the point of beginning of a curve concave Southwesterly and having a radius of 15 feet, a radial line from said point bearing South $16^{\circ} 42' 35''$ West; thence Southeasterly along said curve a distance of 24.45 feet to a point in the Easterly line of said Lot; thence South $20^{\circ} 05' 45''$ West along said Easterly line 108.24 feet to the Southeast corner of said Lot; thence South $88^{\circ} 36'$ West 13.03 feet to the point of beginning.

Parcel 18

An un-divided one-fourth interest in Lot 14 in Block 7 of Long Beach Harbor Tract, in the City of Long Beach, as per map recorded in Book 10, Page 142 of said Map Records.

Parcel 19

Lot 5 in Block 20 of said Long Beach Harbor Tract; together with all right title and interest in

Exhibit "A"—(Continued)

to and under that certain Community Oil and Gas Lease, therein called "North Harbor No. 3 Community Oil Lease".

Parcel 20

That portion of Lot 20 of the 1419.09 acres tract of Rancho Los Cerritos, commonly known as Wilmington Colony Tract, in the City of Long Beach, County of Los Angeles, State of California, as per map recorded in Book 4, Pages 405 and 406, of Miscellaneous Records of said County, described as follows:

All of said Lot lying Westerly of the Westerly line of Plat No. 2, Garden Home Tract, as per map thereof recorded in Book 11, Page 39, of Maps, records of said County; Easterly of the Easterly line of Terminal Freeway of the State of California, as per deed recorded in Book 23760, Page 97, Official Records of said County; and Southerly of a line drawn parallel with the center line of Hill Street, (40 feet wide), distant 664.71 feet Northerly therefrom and measured at right angles thereto. Except the Southerly 20 feet thereof, included in Public Road.

Parcel 21

Part of Lot 6, portion of Maria Dolores Dominguez de Watson 3365.95 Acre Allotment of the Partition of the Rancho San Pedro, Records filed Map 135, Superior Court Case No. 3284, Beginning at a point on the Northerly line of Grant Street 1992 feet Westerly from the intersection of the Westerly line of Hobson Avenue and the Northerly

Exhibit "A"—(Continued)

line of Grant Street; thence Westerly along the Westerly prolongation of said Northerly line 419.98 feet to [95] a point on the Northeasterly line of Southern Pacific Railroad Company right of way; thence Southeasterly along said Northeasterly line 456.44 feet; thence Northeasterly 178.84 feet to beginning containing .86 acres, more or less.

Excepting Therefrom that portion included in right of way of Los Angeles & Salt Lake Railroad Company, as per deed recorded in Book 11447, Page 8, Official Records of Los Angeles County, California, described as follows:

Beginning at a point in the prolongation Westerly of the Northerly line of Grant Street, formerly Watson Alley, (30 feet wide), as shown on Map of the Dominguez Harbor Tract, recorded in Book 12, Pages 14 and 15, of Maps, Records of said County, distant South $84^{\circ} 42' 22''$ West 21.35 feet, measured along said prolonged line of Grant Street, from the Northerly prolongation of the West line of Block 10 of said Dominguez Harbor Tract, said point of beginning being a point in a curve concave Southeasterly and having a radius of 914.37 feet, the tangent to said curve at said point bearing South $75^{\circ} 36' 50''$ West; thence Southwesterly along said curve 243.76 feet to a point in the North line of the 50-foot right of way of the Southern Pacific Railroad distant North $72^{\circ} 13' 38''$ West 276.50 feet, more or less, measured along said North line, from the Southerly prolongation of the West line of said Block 10, of Dominguez Harbor Tract; thence along

Exhibit "A"—(Continued)

the North line of said 50-foot right of way North $72^{\circ} 13' 38''$ West 90.43 feet to a point in a curve concave Southeasterly and having a radius of 982.88 feet, the tangent to said curve bearing North $56^{\circ} 46' 16''$ East; thence Northeasterly along said curve 79.91 feet to a point in said prolongation Westerly of the Northerly line of Grant Street, distant South $84^{\circ} 42' 22''$ West 265.27 feet, measured along said prolonged line, from the Northerly prolongation of the West line of said Block 10, of Dominguez Harbor Tract; thence along said prolonged line of Grant Street North $84^{\circ} 42' 22''$ East 243.92 feet to the point of beginning.

Parcel 22

Block 22, of Selvas de Verdugo, as per map recorded in Book 37, Pages 77 to 83, inclusive, of said Map Records.

Except that portion deeded to the City of Glendale for street purposes to be known as Hillside Drive, by deed recorded in Book 5637, Page 320, Official Records.

Parcel 23

Lot 20 in Block 25 and Lots 1 and 21 in Block 26 of Selvas de Verdugo, Sheet 8, as per map recorded in Book 44, Page 64 of said Map Records.

Parcel 24

Those portions of Lots 2, 3 and 22 in Block 42 and those portions of Lots 16 and 17, in Block 43, of said Selvas de Verdugo, included within the Los Angeles County Flood Control Channel as described in Superior Court Case No. 402578, Los An-

Exhibit "A"—(Continued)

geles County, as per map recorded in Book 84, Pages 99 and 100 of said Map Records. [96]

Parcel 25

Lot 19 in Block 43 of said Selvas de Verdugo as per map recorded in Book 84, Pages 99 and 100 of said Map Records, except that portion of said Lot deeded to Southern California Edison Company for Right of Way purposes.

Parcel 26

Lot 3 of the Verdugo Estate, as per map recorded in Book 12, Pages 34 and 35 of said Map Records.

Except those portions described as follows:

Beginning at a point in the Northerly boundary line of said Lot 3 of the Verdugo Estate, which point is distant South $88^{\circ} 37'$ West 43.54 feet along said Northerly boundary from the Easterly terminus of that certain course in said Northerly Boundary line shown on said above-mentioned map as having a bearing of North $88^{\circ} 37'$ East and a length of 19.185 chains; thence from said point of beginning, North $88^{\circ} 37'$ East 43.54 feet along the Northerly boundary line of said Lot 3 to an angle point; thence South $62^{\circ} 15'$ East 577.50 feet along the Northeasterly boundary line of said Lot to the most Easterly corner of said Lot 3; thence along the Easterly boundary line of said Lot the following five courses and distances: South $30^{\circ} 54' 20''$ West 427.9 feet; South $6^{\circ} 3' 40''$ West 901.96 feet; South $56^{\circ} 32' 25''$ West 200.49 feet; South $0^{\circ} 57' 50''$ West 264.60 feet, and South $29^{\circ} 24'$ West 135.36 feet;

Exhibit "A"—(Continued)

thence North $0^{\circ} 02' 55''$ West 2023.95 feet, more or less, to the point of beginning.

Also Excepting a strip of land 150 feet in width across said Lot 3 as conveyed to Southern California Edison Company by deed recorded in Book 4602, Page 238, Official Records.

Parcel 27

That portion of Rancho Los Cerritos, in the City of Long Beach, County of Los Angeles, State of California, described as follows:

Beginning at the most Southwesterly corner of the land described in the deed to the Title Insurance and Trust Company, recorded in Book 5577, Page 105 of Deeds, Records of said County, in the Northwesterly line of Channel No. 3, Long Beach Harbor; thence along said Northwesterly line South $64^{\circ} 42' 30''$ West 250 feet; thence North $19^{\circ} 42' 30''$ East 738.08 feet; thence North $64^{\circ} 42' 30''$ East 250 feet to the most Northwesterly corner of the land described in said deed to the Title Insurance and Trust Company; thence along the Northwesterly line of said land so described, South $19^{\circ} 42' 30''$ West 738.08 feet to the point of beginning.

In Book 1, Page 10 of the County Recorder's Assessment Maps, is the record of a map filed February 9, 1917, made by the City Engineer of the City of Long Beach for local assessment purposes, only, upon which map the above described property is designated as Lot 18. [97]

Parcel 28

That portion of the Southwest quarter ($SW\frac{1}{4}$)

Exhibit "A"—(Continued)

of the Northwest quarter (NW $\frac{1}{4}$) of Section Twelve (12), and of the North half (N $\frac{1}{2}$) of the Southwest quarter (SW $\frac{1}{4}$) of Section 12 (12), Township Twenty-three (23) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, in the County of Tulare, State of California, lying West of the Right of Way of the Atchison, Topeka and Santa Fe Railroad.

Excepting therefrom that portion thereof included within the following boundaries:

Beginning at the intersection of the East and West center line of Section Twelve (12), Township Twenty-three (23) South, Range Twenty-three (23) East, Mount Diablo Base and Meridian, and the Western Boundary line of the Atchison, Topeka and Santa Fe Railroad Right of Way, running thence Northwesterly One Thousand and Sixty (1060) feet along the West Right of Way boundary of the Atchison, Topeka and Santa Fe Railroad Right of Way; thence Southwesterly and at right angles to said Right of Way boundary line One Hundred (100) feet; thence Southeasterly and at right angles to the line last described and parallel with the Western Boundary line of the Right of Way of the Atchison, Topeka and Santa Fe Railroad One Thousand (1000) feet to the point of intersection with the East and West center line of said Section Twelve (12); thence East along said center line of said Section Twelve (12) to the place of beginning.

Tax bill shows 74 acres. [98]

EXHIBIT "B"

Paul W. Sampsell, Trustee in Bankruptcy for
F. P. Newport Corporation, Ltd.

INVENTORY OF REAL PROPERTIES

March 31, 1952

The Trustee has an interest, subject to tax sales for delinquent taxes, delinquent street improvement bonds, and Trust Deed or Mortgage encumbrances, in the following properties:

All that real property situated in the County of Los Angeles, State of California, described as follows:

Parcel 1: Lot 13, Block 1484, Tract 6889, in the County of Los Angeles, as per map recorded in Book 83, pages 81-84, of Maps, in the office of the County Recorder of said County.

Parcel 2: Lots 8 and 24, Tract 4044, in the City of Glendale, as per map recorded in Book 43, Page 79 of Maps, in the office of the County Recorder of said County.

All that real property situate in the County of Kings, State of California, described as follows:

Parcel 1: Lot 5, Block 27, Corcoran Townsite, in the City of Corcoran, as per map recorded in Book 1, Page 85, of Maps, in the office of the County Recorder of said County. [99]

EXHIBIT "C"

Paul W. Sampsell, Trustee in Bankruptcy for
F. P. Newport Corporation, Ltd.

INVENTORY OF PERSONAL PROPERTY

March 31, 1952

- 1—3 drawer—letter size—steel file.
- 4—Metal Map Cases—roller type.
- 1—Center drop—typewriter desk—oak.
- 9—Oak arm chairs.
- 4—3 drawer—letter size—steel files.
- 1—2 drawer—2 cash drawers—letter size—steel file.
- 1—3 drawer—legal size—steel file.
- 2—4 drawer—letter size—steel files.
- 1—14" Underwood Typewriter—elite type.
- 1—Typewriter Table—oak.
- 1—Oak—Flat—Linoleum Top—Table.
- 1—Card File—Desk Type.
- 1—Oak Table—filing.
- 1—Oak—Roll Top Desk.
- 1—Oak—Desk—flat linoleum top.
- 1—Monroe Calculator—hand type.
- 1—Error-no—(needs repairing).
- 1—Electric Heater.
- 1—Oak—Swivel Chair.
- 1—Typewriter Chair—Oak.
- 1—Oak—Map Cabinet File—8 drawers.
- 1—Oak—Legal size—desk file.
- 1—Oak—Desk Companion.
- 1—6 drawer—5"x8"—Y & E file—Oak.

Exhibit "C"—(Continued)

- 1—8 drawer—6"x4"—Y & E file—Oak; 1 drawer letter size—Oak.
- 1—Telephone Table—Oak.
- 1—Oak—4 drawer—desk letter file. [100]
- 1—Oak File—Legal size.
- 1—Oak File—Legal size.
- 1—Typewriter Chair—Oak.
- 1—Legal size—Transfer drawer.
- 1—2 drawer—card file—oak—3"x5".
- 1—Oak—Map Cabinet File.
- 1—14 drawer—file cabinet.
- 1—Oak Costumer—(hat tree).
- 1—Oak—7 drawer—desk letter file.

At Sampsell warehouse or on consignment
13—Letter size—steel transfer files.

- 1—12 bank and date—Burroughs Adding Machine (out of order).

In storage at 3235 No. Verdugo Road, Glendale.

- 1—Roll Top Desk—Oak.
- 1—Flat top desk—(from which rolltop has been removed).
- 2—Small Desks—Salesmen type.
- 1—Directors Table.
- 1—Gas Heater.
- 3—Office arm chairs.
- 1—Swivel Chair.

(All golden oak finish.) [101]

Duly Verified. [102]

[Endorsed]: Filed April 14, 1952.

[Title of District Court and Cause.]

PETITION TO REVIEW REFEREE'S ORDER

To the Honorable Hugh L. Dickson, Referee in
Bankruptcy:

Your petitioners respectfully show:

I.

That they are the above named bankrupt and certain unsecured creditors of F. P. Newport Corporation, Ltd., a corporation, the above named bankrupt, whose claims have been filed herein.

II.

That during the course of the proceedings herein, the trustee, on or about April 14, 1952, filed herein his petition for an order, which petition was entitled "Petition For Order of Liquidation". That said petition alleged in part that the "* * * annual income coming to the estate from all sources does not exceed the sum of \$35,000, principally from oil royalties" (Petition, p. 2, lines 12-14); that "* * * prior to on or about December 14, 1951, when the compromise referred to * * * was consummated, it was impracticable to liquidate the assets of the said estate * * *" (Petition, p. 2, lines 28-30); that "in the opinion of petitioner the continued operation of this estate by [106] petitioner as trustee herein is not in the best interests of the creditors hereof and others interested herein, but that said estate should be liquidated speedily as possible and the proceeds paid out to defray the cost of administration, taxes

and other expenses and the remainder paid to the unsecured creditors hereof" (Petition, p. 3, lines 17-23). (Emphasis added.)

That said trustee prayed that the Referee by his order "* * * direct petitioner as trustee herein henceforth not to operate the business of the bankrupt, but to sell the assets hereof at public auction for cash either in bulk or in parcels as the Court may direct, to liquidate the estate and convert its assets into money, or to take such other action as the Court may deem proper in the premises" (Petition, p. 4, line 31 to p. 5, line 3). (Emphasis added.)

III.

That said petition was heard on May 1, 1952, before the Honorable Hugh L. Dickson, Referee in Bankruptcy. That thereafter, and without the making of findings of fact, the said Referee, on May 26, 1952, made and caused to be filed herein on said date, his written order entitled "Order of Liquidation." That a true copy of said order is attached hereto, marked "Exhibit A", and is made a part hereof as if fully set forth at this place.

IV.

That said order was and is erroneous in that:

(a) It was and is beyond the jurisdiction of the Referee.

1. The United States Court of Appeals for the Ninth Circuit has heretofore expressly ruled in this case that the trustee herein "* * * was operating the

property of the corporation, and under orders of the court.” (Emphasis added.) *United States vs. Metcalf*, 131 Fed. 2d 677.

2. “Courts of Bankruptcy” have the exclusive power to authorize the business of bankrupts to be conducted by receivers and trustees. National Bankruptcy Act, Section 2(5). [107]

3. The Referee is not a “Court of Bankruptcy” and has no such power. National Bankruptcy Act, Section 1 (10).

4. The business of the bankrupt having been operated by the trustee herein from January 12, 1937, to date “* * * under orders of the court * * *” (*United States vs. Metcalf*, 131 Fed. 2d 677), said operation may not be terminated by the Referee but only by the “Court of Bankruptcy”, which is defined by Section 1 (10) of said Act as “* * * the district courts of the United States.”

5. Said ruling of the Ninth Circuit was made on November 23, 1942, and the trustee has at all times since accounted to the Collector of Internal Revenue, claimed tax deductions for losses sustained on the sale of certain assets, and paid Federal and State income taxes upon the basis that he was legally operating the business of the bankrupt.

(b) That said order directing that the trustee cease to operate the business of the bankrupt and to proceed at once to sell the assets “* * * at private sale or at public auction * * *” is not in the best interests of the unsecured creditors, the bankrupt, its stockholders, or any other interested party but is,

if the Referee has any discretion whatsoever (which is not admitted by your petitioners), an abuse of discretion by the Referee in that:

1. During the time that the business of the bankrupt has been operated by the trustee herein, assets have been liquidated, as of March 31, 1952, in the total sum of two million four hundred eleven thousand seven hundred seventy-three dollars and twelve cents (\$2,411,773.12).

2. That the remaining assets have been recently appraised by banking interests as having a fair market value in a sum in excess of seven hundred thousand dollars (\$700,000.00), and by a competent real estate and general appraiser as having a like value in the sum of one million dollars (\$1,000,000.00). [108]

3. That notwithstanding statements made at said hearing in reference to the non-liquidation of assets of the bankrupt, except as to oil, the fact is that during the operation of the business of the bankrupt the trustee herein has disposed of real property of the bankrupt estate as follows:

Subdivided lots	\$242,991.29
San Fernando Valley acreage.....	157,604.44
Verdugo Park and acreage	86,430.56
40 acre tract, U. S. Government.....	42,615.00
Crescenta Oaks, Tract 8447.....	45,500.00
State of California	25,425.00
Compromise, 6 acres waterfront.....	222,042.67

Total.....\$822,608.96

In addition to that sum and the income from oil

royalties in the sum of \$1,472,567.89, the trustee has collected rentals in the sum of \$90,278.69 and about \$25,000.00 in miscellaneous income.

4. That, as shown by said "Petition", the secured indebtedness of the bankrupt has been paid and that apart from the expenses of administration the bankrupt has indebtedness remaining only to the unsecured creditors in the sum of approximately \$194,000.00.

(c) That it, in effect, denies to the bankrupt the right to complete its plan of reorganization now pending whereby said assets of a value between \$700,000.00 and \$1,000,000.00 are to be used by the bankrupt for the purpose of obtaining a loan in the sum of \$250,000.00, which is believed to be a sum sufficient to pay the unsecured creditors in sums acceptable to them and to pay the expenses of administration in full.

The reason that it does so is that financial institutions willing to make such loan state that they cannot be committed in any such sum upon the security of assets that are subject to being [109] auctioned off in whole or in part without the knowledge or consent of either borrower or lender.

(d) That notwithstanding that a reorganization in bankruptcy is expressly made tax free by the Internal Revenue Code, the sale by the trustee of the assets at public auction or otherwise will not be tax free but will be subject to Federal and State income taxes which will be so great that, as stated by Ralph G. Ritchie, Certified Public Accountant and tax advisor to the trustee herein for the last ten

or more years, "will leave little or nothing for anybody." (Letter, Ralph G. Ritchie to counsel for trustee dated May 2, 1952.)

(e) That while it is true that the trustee and his counsel both recognize the seriousness of the tax problem involved by auction or other mass liquidation sales by the trustee rather than a reorganization by the bankrupt, and that through said "Order of Liquidation" it might be contended that sales made thereafter by the trustee can be claimed to be tax free by the trustee, it is apparent that like contentions have been made by bankruptcy trustees but that the courts have refused to sustain them.

As to the effect of Mr. Ritchie's said letter of May 2, 1952, the trustee's counsel has, after referring to the said letter in said counsel's letter of May 5, 1952, addressed to Mr. Ritchie, the trustee, and others, stated in part as follows:

"The remainder of this letter is addressed especially to Mr. Bouchard and Mr. Ritchie. This proceeding involves a very serious tax question."

Just how serious may be observed from the following:

1. Mr. Ritchie's said letter states in part as follows:

"I would like to point out the tax consequences of the proposed auction—based upon the following facts:

"1. Mr. Sampsell, as Trustee in Bankruptcy, is [110] liable for the corporate taxes on all sales made by him.

"2. The bankrupt is a real estate corporation

and, as such, is not entitled to the capital gain provisions or rates unless it can be clearly shown that the property involved is held primarily for investment—the order may or may not help.

“3. Assuming that an auction would bring \$300,000.00—the cost is \$100,000.00, then the tax on the \$200,000.00 would be subject to not only the normal and surtax rates of 52% but, also, the 30% Excess Profits Tax which would leave little or nothing for anybody.” (Emphasis added.)

(f) As to the law, we have but to look at two cases:

In this very proceeding the Ninth Circuit in *United States vs. Metcalf*, 131 Fed. 2d 677, has, in holding that the trustee herein must pay income taxes, stated:

“It is what the trustee does that determines his tax liability. If there had been no order at all and he had operated the properties, he could no more escape tax liability on the ground that such action was illegal than any other lawbreaker can escape liability for the profits of his illegal enterprise. *United States vs. Sullivan*, 274 U.S. 259, 47 S.Ct. 607, 71 L.ed 1037, 51 A.L.R. 1020.” (Page 679)

In the *Matter of Loehr*, Bankrupt (D.C. Wis. 1950) 51 U.S. Tax Cases Sec. 9244, the court, after first noting: “A trustee was then appointed who was directed to liquidate the estate”, and then noting the contention of the trustee “* * * that in this case, since the trustee had authority only to liquidate he was not ‘conducting any business’ and that therefore the statute is not applicable”, held, on the authority

of Mid America Co., 31 Fed. Supp. 601, and of the [111] approval of the rule laid down therein by the Court of Appeals for the Eighth Circuit in *State of Missouri vs. Gleick*, 135 Fed. 2d 134, that: “* * * the claim of the State and Federal governments for income taxes against the trustee should have been allowed.”

V.

Thus it will be seen that said erroneous order can only create chaos by destroying the ability of the bankrupt and its creditors to effect a tax free reorganization as provided by the Internal Revenue Code and by subjecting the bankrupt and his creditors to possibly a total loss through the imposition of a 52% tax, plus 30% excess profits tax, on everything that the trustee can obtain over \$100,000.00 at an auction sale or other sale provided for by said Order of Liquidation.

The first \$100,000.00 is offset by remaining cost so it will be tax free. It will just about pay the expenses of administration. As to the remainder, any part of the \$700,000.00 to \$1,000,000.00 of assets will, through such sale or sales by the trustee, in the words of the tax expert, “* * * leave little or nothing for anybody.”

The “anybody” will, of course, be the unsecured creditors and the bankrupt and its stockholders who, in asking that said order be vacated and set aside, ask that the following rules laid down by the Ninth Circuit in this very case (*Proctor and Gamble Mfg. Co. vs. Metcalf*, 173 Fed. 2d 207) be applied.

(a) "Where there are even slight circumstances which suggest that there is any unfairness to the estate in bankruptcy, a careful consideration should be had on review and a confirmed sale should be set aside if necessary to rectify the situation." (Page 209.)

(b) "* * * the District Judge has the responsibility to see that a sale which leaves the estate unprotected should not be confirmed." (Page 209)

(c) "Balancing that it is of overwhelming importance that [112] the rights of creditors in a bankruptcy should be protected and that a disposal of property on terms which violates the same should not be permitted to stand." (Emphasis added as to all quotations.)

Wherefore, your petitioners pray for a review of said order by the Judge, that said order be vacated and set aside.

Dated: June 2, 1952.

F. P. NEWPORT CORPORATION,
LTD.,

/s/ By F. P. NEWPORT, President

/s/ FAYE MacMILLAN PENDER,
Attorney-in-Fact for Martha T.
MacMillan,

/s/ ADDIE E. HURLBURT GARLAND

/s/ MRS. F. P. NEWPORT

/s/ DOROTHY DAY,

/s/ [Illegible]

/s/ L. M. CAHILL, Attorney for Petitioners [113]

EXHIBIT "A"

[Title of District Court and Cause.]

ORDER OF LIQUIDATION

Paul W. Sampsell, Trustee in Bankruptcy of the above entitled estate, having filed herein his verified Petition for Order of Liquidation, and said petition having come on regularly for hearing before Honorable Hugh L. Dickson, Referee in Bankruptcy, on May 1, 1952, at 10:00 o'clock a.m., the Trustee appearing by his counsel Messrs. Bailie, Turner & Lake by Norman A. Bailie, Esq., George Bouchard, Esq., his tax counsel, and Ralph G. Ritchie, his tax accountant being also present; the Bankrupt appearing by F. P. Newport its President, and L. M. Cahill, Esq., its attorney; Bank of America National Trust and Savings Association, the largest unsecured creditor, appearing by Edmund Nelson, Esq., its attorney; and Addie E. Hurlburt Garland, an unsecured creditor, appearing by Hugh Ward Lutz, Esq., her attorney; and oral testimony having been introduced; and the Court having heard the statements of counsel for the Trustee, and the said Bank of America, and the said Bankrupt; and no one appearing in opposition to said petition; and the Court being fully advised in the premises; and it appearing to the Court that notice [114] to creditors of the time and place of the hearing of said petition has been duly and regularly given according to law, and that each and every allegation in said petition is true; that said Trustee is not and has not been for more than one

year last past operating the business of the Bankrupt, that the property of the estate has been and is being held by the Trustee as a trust for the benefit of creditors and not otherwise, that the interest of the creditors requires that said estate should be expeditiously liquidated: and that said petition should be granted,

It Is Hereby Ordered, Adjudged and Decreed, That said Trustee proceed with all due *dilligence* to sell the assets of said estate either at private or at public auction for cash either in bulk or in parcels as the Court shall from time to time direct, subject to confirmation by the Court, to the end that the assets of said estate may be speedily converted into money, the expenses of administration paid, the residue paid to the creditors as required by law, and the estate closed.

Dated this 26 day of May, 1952.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [115]

[Endorsed]: Filed June 5, 1952.

[Title of District Court and Cause.]

CLAIM OF UNITED STATES FOR TAXES

State of California,
County of Los Angeles—ss.

R. A. Riddell, District Director of Internal Revenue, Los Angeles, California, a duly authorized agent for the United States in this behalf, being

duly sworn, deposes and says: (1) That the above-named is justly and truly indebted to the United States in the sum of \$11,391.21, with Interest and/or Penalties thereon as hereinafter stated; and (2) That the nature of the said debt is internal revenue taxes due pursuant to law as follows:

Tax Incurred During Administration		
Administrative Expense		
Deficiency		Int. to 1/20/54
Income, 1952	11,391.21	578.92
		Total \$11,970.13

Further interest will accrue on the above tax at the rate of 6% per annum, or \$1.87 per day, from January 20, 1954, until paid.

The basis of the deficiency is set out in Form 7900 letter which was mailed to the corporation in care of Paul W. Sampsell, Trustee, under date of December 28, 1953.

(3) That no part of said debt has been paid, but the the same is now due and payable at the office of the District Director of Internal Revenue at Los Angeles, California; (4) That there are no set-offs or counterclaims to said debt; (5) That the United States does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debt, except statutory liens; (6) That the said indebtedness is now due and payable; that no note or other negotiable instrument has been received for said debt or any part thereof; and that no judgment has been rendered thereon; (7) That

said debt has priority, and must be paid in advance of distributions to creditors, as and to the extent provided in Section 64a(4) of the Bankruptcy Act, or other applicable provisions of law.

Dated this 6th day of January, 1954.

/s/ R. A. RIDDELL,

District Director of Internal Revenue, Los Angeles,
California.

Subscribed and sworn to before me this 6th day
of January, 1954.

[Seal] /s/ WARREN A. BATES,
Notary Public

[Endorsed]: Filed January 7, 1954. [2]

[Title of District Court and Cause.]

OBJECTIONS TO CLAIM OF UNITED STATES GOVERNMENT FOR TAXES ALLEGED TO BE DUE

The is attached hereto marked "Exhibit A", a copy of a Revenue Agent's Report dated December 23, 1953, and addressed to Trustee in Bankruptcy, showing the results of an examination of Bankrupt's Federal Income Tax Returns for the years ended December 31, 1950, 1951 and 1952. The report indicates various adjustments to which specific objections will hereafter be made. The Revenue Agent's Report proposes a deficiency of income tax

for the year 1952 only in the amount of \$11,391.21.

On or about the 6th day of January, 1954, R. A. Riddell, District Director of Internal Revenue of Los Angeles, California, caused to be filed with the Referee herein, a claim of the United States for taxes in the said amount of \$11,391.21, together with interest thereon in the amount of \$578.92, or a total of \$11,970.13, representing the claim of the United States Government with interest accrued to the date of January 20, 1954. A copy of said claim is attached hereto marked "Exhibit B".

Objection is made to the allowance of this claim for the reason that it is predicated upon erroneous adjustments and conclusions of the Examining Agent and, therefore, there is no debt or liability to the United States Government to form the basis of an allowable claim.

Comments Regarding the Years 1950 and 1951

The Examining Agent in reviewing Bankrupt's returns for the years 1950 and [3] 1951 accepted those returns as properly reporting operating losses and agreed that no income taxes were due for those years. Objection is made for the record, however, that the Examining Agent improperly allowed as a deduction accrued interest in the years 1950 and 1951 upon claims filed against Bankrupt. This objection is based upon the theory that there is no legal obligation to pay interest upon approved claims until it has first been established that Bankrupt's estate is adequate to pay the principal amount of claims, and that during the years in-

volved there was neither any matured obligation to pay interest or any reasonable expectancy that interest would in fact be ultimately payable.

Adjustments Proposed for the Years 1952 and Specific Objections Thereto

Bankrupt's return for the year 1952 reported transactions only from January 1st of that year until May 26th, at which time the Referee in Bankruptcy of the United States District Court, Southern District of California, Central Division, entered an order:

"That said Trustee proceed with all due diligence to sell the assets of said Estate either at private or public auction, for cash, either in bulk or in parcels, as the Court shall from time to time direct, subject to confirmation by the Court to the end that the assets of said Estate may be speedily converted into money, the expenses of administration paid and the residue paid to creditors as required by law and the Estate closed."

It is respectfully submitted that the effect of the above order was to terminate the transaction of any business theretofore carried on and to place Bankrupt in the process of liquidation.

It has been repeatedly held that the process of liquidation pursuant to Court order does not give rise to taxable income nor does it require the filing of a Federal income tax return. See Walter Feigenbaum "The Tax Triangle: Creditor-Debtor—Commissioner—" *Taxes Magazine*, June 1952 at page 461, "* * * when a trustee in bankruptcy merely liquid-

ates the assets of a corporation he is neither required to file a return nor to pay any tax on any gain resulting from such liquidation"; and Morton Pepper "Income Tax Problems that come with Bankruptcy", New York University's Sixth Annual Institute on Federal Taxation at page 745, "However, where income is received in the course of liquidation no return is required." Among the authorities cited by the writers for statements to the above effect are [4] the following: In re Owl Drug Co. (D. C. Nevada) 21 F.Supp. 907; In re: Heller, Hirsh & Company (CCA-2, 1919) 258 F. 208, and Standard Oil Company of Louisiana vs. Apex Oil Corp. (Court of App. Tenn, 1951), 244 S.W. 2nd. 176.

In the Owl Drug Co. case, *supra*, the Court summarized what we believe to be the precise issue in this instance, as follows:

"The business of the bankrupt here, before the bankruptcy, was the operation of drug stores in several western states. After the bankruptcy, the trustee continued to operate the stores for a while. Then he sold them. When he did, the business of the bankrupt was liquidated. The only property in the hands of the trustee was the money received from the sale. This he was holding, subject to bankruptcy administration. While he operated the drug stores, his income was clearly income from operation. After the sale, the interest was received from the deposit of the money in various banks was earned, not by the bankrupt's business, but by the money into

which the business had been transmuted through the sale. In holding the money, the trustee was "not pursuing the ends for which the corporation was organized." (Emphasis indicated is that of the Court.)

As a result of the erroneous inclusion of items of alleged income arising out of liquidating transactions and during the period of liquidation as directed by the Court, the Examining Agent proposes to include additional income for the year 1952 as follows:

Interest	\$ 440.37
Royalties	20,681.80
Net Long Term Capital Gain....	54,227.12
Installment Sales Gain	3,351.20
<hr/>	
Total.....	\$78,700.49

Objection is made to the proposed inclusion in taxable income of Bankrupt for the year 1952 of the entire amount of the aforementioned items. The Agent's determination that this income should be included is wholly erroneous and contrary to well established law.

The Examining Agent further proposes to reduce net operating loss carry-overs from prior years to the year 1952 by the sum of \$19,921.22. The net operating loss carry-over claimed by Bankrupt on its 1952 return is not questioned by the Agent in its amount but [5] the Agent proposes to reduce operating losses of prior years by the amount of depletion claimed in those years. In attempting to

thus restore depletion, the Examining Agent has acted erroneously in that he has overlooked the provisions of Section 122(d)(1) of the Internal Revenue Code. Under the provisions of this Section, the adjustment cannot exceed the excess, if any, of percentage depletion allowed over the amount that would have been allowable if cost depletion had been claimed. See *Cambria Collieries Co. vs. Commissioner*, 10 T.C. 1172, dismissed (6 Cir.: 4-21-49). No consideration has been given to the amount of cost depletion which might be allowable under the statute, and the action of the Agent is, therefore, erroneous in proposing this adjustment.

As in the case of the years 1950 and 1951, the Agent has allowed as a deduction accrued interest on claims filed in this proceeding. For the record, objection is again made to the accrual of interest in a year in which the same is not a legal obligation and in which the likelihood of its ultimate payment is contingent and improbable.

Conclusion

It is respectfully submitted that the claim of the United States Government filed herein in the amount of \$11,391.21, together with proposed interest thereon in the sum of \$578.92, is based upon erroneous conclusions and misinterpretations of the law and the same is, therefore, without merit and does not constitute a debt properly owing which could form the basis of an allowable claim in this proceeding.

The claim of the United States Government

should, therefore, be disallowed in its entirety.

Respectfully submitted,

/s/ GEORGE BOUCHARD,

Special Tax Counsel for Paul W. Sampsell, Trustee
in Bankruptcy [6]

EXHIBIT "A"

Form 7900—Chief, Audit Division, 312 N. Spring
St., Los Angeles 12, California.

A:R:LHP

Dec. 23, 1953

F. P. Newport Corporation, Ltd.,
Mr. Paul W. Sampsell, Trustee in Bankruptcy
1009 Haas Bldg., Los Angeles 14, California.

Dear Mr. Sampsell:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1950, 1951 and 1952, discloses a deficiency of \$11,391.21, as shown in the statement attached.

Said tax is being assessed against you under the provisions of existing internal revenue laws applicable to bankruptcies and receiverships. Pursuant thereto no petition for redetermination may be filed with The Tax Court of the United States after the adjudication of bankruptcy or the appointment of a receiver.

Attention is called to the rights and priorities of the United States under section 64(a) or other applicable provisions of the Bankruptcy Act, as

amended, and under section 3466 of the Revised Statutes. Section 3467, Revised Statutes, as amended by section 518 of the Revenue Act of 1934, imposes personal liability upon every executor, administrator, assignee, or other person who, in paying debts of the person or estate for whom or for which he acts, fails to observe the priority in payment prescribed by law in favor of the United States.

The District Director is authorized to file proof of claim for any tax liability in proceedings under the Bankruptcy Act and in receivership cases.

The filing of proof of claim will not prejudice an application to this office for reconsideration of the above-mentioned tax. In order to facilitate adjustment of objections raised, a protest, executed in triplicate and under oath, stating in detail the grounds for your exceptions, may be submitted to this office within thirty days from the date of this letter. Affidavits or other data supporting such exceptions should be transmitted therewith.

Very truly yours,

T. COLEMAN ANDREWS,
Commissioner

/s/ By R. A. RIDDELL,
District Director

LHP:mee—Enclosure: Statement.

[7]

Statement

F. P. Newport Corporation, Ltd., Mr. Paul W. Sampsell, Trustee
in Bankruptcy, 1009 Haas Building, Los Angeles 14, Calif.
A:R:LHP

Tax Liability for the Taxable Years Ended
December 31, 1950, 1951 and 1952

Year Ended	Liability	Assessed	Over- assessment	Deficiency
12/31/1950				
Income Tax	\$ None	\$ None	\$ None	\$ None
12/31/1951				
Income Tax	None	None	None	None
12/31/1952				
Income Tax	11,391.21	None		11,391.21
	<hr/>	<hr/>	<hr/>	<hr/>
Totals	\$11,391.21	\$ None	\$ None	\$11,391.21

This determination of your income tax liability has been made upon the basis of information on file in this office.

The contention in a statement attached to your return that you were relieved from any obligation to report income and expenses or to pay tax upon net income for the period subsequent to May 26, 1952, the date of a certain court order instructing you to "proceed with due diligence to sell the assets of said estate * * *", is denied. It has been determined that you received income as shown herein, and that such income is subject to tax under the provisions of the Internal Revenue Code.

ADJUSTMENT TO NET INCOME

Taxable Year Ended December 31, 1950

Net income as disclosed by return (loss).....	\$(1,554.07)
Additional deduction (a) Accrued interest.....	2,684.92
	<hr/>
Net income adjusted (loss).....	\$(4,238.99)

EXPLANATION OF ADJUSTMENT

(a) An additional deduction of \$2,684.92 is allowed for accrued interest, not claimed in your return.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1950

Net income adjusted (loss).....	\$(4,238.99)
Correct income tax liability.....	None
Income tax liability shown by return.....	None
	<hr/>
Deficiency (overassessment) of income tax.....	\$ None

ADJUSTMENT TO NET INCOME

Taxable Year Ended December 31, 1951

Net income as disclosed by return (loss).....	\$(22,456.92)
Additional deduction: (a) Accrued interest.....	5,453.37
<hr/>	
Net income adjusted (loss).....	\$(27,910.29)

EXPLANATION OF ADJUSTMENT

(a) An additional deduction of \$5,453.37 is allowed for accrued interest, not claimed in your return.

COMPUTATION OF TAX

Taxable Year Ended December 31, 1951

Net income adjusted (loss).....	\$(27,910.29)
Correct income tax liability	None
Income tax liability shown by return.....	None
<hr/>	
Deficiency (overassessment) of income tax.....	\$ None

ADJUSTMENTS TO NET INCOME

Taxable Year Ended December 31, 1952

Net income as disclosed by return (loss).....	\$(26,160.64)
Additional income and unallowable deduction:	
(a) Interest	\$ 440.37
(b) Royalties	20,681.80
(c) Net long-term capital gain.....	54,227.12
(d) Installment sales gain	3,351.20
(e) Net operating loss deduction	
decreased	19,921.22
<hr/>	
Total.....	\$ 72,461.07

Additional deductions:

(f) Salaries and wages	\$ 2,400.00
(g) Rent	420.00
(h) Taxes	8,718.34
(i) Depletion	5,687.49
(j) Telephone	159.41
(k) Moving and travel	108.79
(l) Insurance	367.15
(m) Legal Fees	217.50
(n) Bankruptcy fees	15,826.58

(o) Oil lease inspection	1,225.00	
(p) Dehydration expense	360.33	
(q) Interest	4,487.39	39,977.98
		<hr/>
Net income adjusted		\$ 32,483.09

EXPLANATION OF ADJUSTMENTS

(a) to (d), inclusive, and (f) to (p) inclusive. The corporation income tax return filed by you on March 13, 1953, reports income and deductions for the period January 1, 1952, to May 26, 1952, only. Pursuant to the determination previously mentioned herein, adjustments are made to include items of income and deductions for the period May 27, 1952, to December 31, 1952, as shown by your books, which you excluded from your return.

(e) The correct net operating loss deduction allowable for the taxable year ended December 31, 1952, has been determined in the amount of \$2,643.18, in lieu of \$22,564.40, the amount claimed in your return, a decrease of \$19,921.22. The amount of \$2,643.18 is computed as follows:

Net operating loss, taxable year ended 12/31/50,	
previously shown herein	\$ 4,238.99
Net operating loss, taxable year ended 12/31/51,	
previously shown herein	27,910.29
<hr/>	
Total.....	\$32,149.28

Adjustments under Sec. 122, I. R. C.:

Depletion, taxable year ended 12/31/50	\$10,780.86	
Depletion, taxable year ended 12/31/51	9,985.37	
Depletion, taxable year ended 12/31/52	8,739.87	29,506.10
		<hr/>

Net operating loss deduction allowable in taxable	
year ended 12/31/52	\$ 2,643.18

(q) It has been determined that the correct deduction for interest for the taxable year ended December 31, 1952, is the amount of \$9,775.89, an increase of \$4,487.39 over the amount reported in your return. The amount of \$9,775.89 is computed as follows:

Interest expense for year ended December 31, 1952, as shown by your books.....	\$14,415.37
Less: Interest accrued on unsecured accounts.....	4,639.48
	<hr/>
Interest expense, as corrected.....	\$ 9,775.89

COMPUTATION OF INCOME TAX

Taxable Year Ended December 31, 1952

Net income adjusted	\$32,483.09
Income subject to tax	\$32,483.09

Computation under General Rule (Sections 13 and 15, I.R.C.)

Income tax (combined normal tax and surtax):

52% of \$32,483.09	\$16,891.21
Less	5,500.00

Total income tax under general rule.....\$11,391.21

Computation of Alternative Tax (Section 117(c), I.R.C.)

	Normal Tax	Surtax
	Net Income	Net Income
Income as above	\$32,483.09	\$32,483.09
Less: Excess of net long-term capital gain over net short-term capital loss.....	54,227.12	54,227.12
Ordinary net income.....	None	None
Partial tax		\$ None
Plus: 26% of \$54,227.12.....		14,099.05
Alternative tax		\$14,099.05
Correct income tax liability (tax under general rule)....		\$11,391.21
Income tax assessed: Original, account No. CN-7403.....		None
Deficiency of income tax.....		\$11,391.21

EXHIBIT "B"

[Printer's Note: Exhibit "B" is a duplicate of Claim of United States for Taxes set out in full at pages 41-43 of this printed Record.] [13]

Affidavit of Service by Mail attached. [14]

[Endorsed]: Filed February 5, 1954.

[Title of District Court and Cause.]

STIPULATION OF FACTS IN CONNECTION
WITH CLAIM OF DIRECTOR OF INTER-
NAL REVENUE FOR 1952 INCOME TAXES

It Is Hereby Stipulated by the trustee of the above-named bankrupt and the Director of Internal Revenue for the Sixth Collection District of California through their respective counsel that the following facts are true:

I.

F. P. Newport Corporation Ltd. was declared bankrupt in this Court in 1935. During the years 1938 and 1939, the trustee in bankruptcy executed certain oil and gas leases covering real estate included in the bankrupt estate, received substantial oil and gas royalty payments, inspected the operation of the property and made leases, contracts and sales of the bankrupt property. The Court of Appeals for the Ninth Circuit (see U.S. vs. Metcalfe 131 Fed. 2d, 677) held that these activities by the trustee in bankruptcy constituted the operation of property within the meaning of Section 52 of the Internal Revenue Code and that said trustee was accordingly liable for income tax on the income received during those years.

II.

In all years subsequent the trustee in bankruptcy has filed Federal income tax returns showing the items of income and deduction during the course of

his administration and paying the tax reported thereon.

III.

On May 26, 1952, the referee in bankruptcy entered an order, a copy of which is [15] attached hereto marked Exhibit "A". On November 28, 1952, the District Court confirmed said order. A copy of the order of the District Judge is attached hereto as Exhibit "B".

IV.

The trustee in bankruptcy filed a Federal income tax return for the calendar year 1952 in which was included only the income and expenses of the trustee for the period January 1, 1952 to May 26, 1952. He did not include in said return income and expenses for the period subsequent to May 26, 1952 for the reason that, as he contended, he was not liable for taxes on such income received subsequent to the date of the order of May 26, 1952 as he was no longer operating the property or business of the bankrupt. The trustee attached to his 1952 income tax return a statement to this effect.

V.

The Director of Internal Revenue has denied the contention of the trustee that the order of May 26, 1952 relieved the trustee from any obligation to report income or to pay tax upon net income for the period subsequent to May 26, 1952. Accordingly, the Commissioner of Internal Revenue determined a deficiency for the year 1952 of \$11,391.21, said deficiency being determined by including in the trus-

tee's income in 1952 all items of income realized by him subsequent to the order of May 26, 1952 and has filed his claim for said taxes in this proceeding. The trustee filed his objections to this claim.

VI.

Much of the property of the corporation which came into the hands of the trustee still remains unsold.

March 18, 1954.

/s/ GEORGE BOUCHARD,

Special Tax Counsel for the Trustee
LAUGHLIN E. WATERS,

U. S. Attorney

E. R. McHALE,

Asst. U. S. Attorney

/s/ By EUGENE HARPOLE,

Special Attorney, Internal Revenue
Service

[16]

EXHIBIT "A"

[Printer's Note: Exhibit "A" attached is a duplicate of Order of Liquidation set out in full at pages 40-41 of this printed Record.]

EXHIBIT "B"

[Title of District Court and Cause.]

ORDER OF DISTRICT JUDGE CONFIRMING REFEREE'S ORDER OF LIQUIDATION

A petition to review an order of liquidation entered by the Referee in Bankruptcy on May 26,

1952, has been under submission by the undersigned District Judge since July 24, 1952.

Although thoroughly argued by the respective parties on the hearing and it appearing at that time to be warranted by the record and files of this protracted bankruptcy proceeding, it was believed by the Judge that if decision on the Referee's order of liquidation were deferred for a reasonable period some other lawfully authorized equitable method of settlement would be forthcoming and duly proposed. Such other proceeding now seems to be unavailable. Accordingly, the Referee's order of liquidation dated May 26, 1952, is confirmed.

Dated November 28, 1952.

PAUL J. McCORMICK,
United States District Judge [19]

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

ORDER DISALLOWING CLAIM OF DIRECTOR OF INTERNAL REVENUE FOR 1952 INCOME TAXES

The objections of the trustee to the claim of the Director of Internal Revenue for income taxes for the year 1952 in the amount of \$11,391.21 came on regularly for hearing on March 18, 1954, before the Honorable Hugh L. Dickson, Referee in Bankruptcy. The trustee appeared by George Bouchard,

his Special Tax Counsel and the Director of Internal Revenue appeared by Eugene M. Harpole, his attorney. The parties have filed a written stipulation of facts which the court adopts as its findings of fact and, having heard the arguments of counsel and being fully advised in the premises, hereby makes its order as follows:

It is ordered, adjudged and decreed that the order of liquidation of the referee dated May 26, 1952, terminated the trustee's authority to conduct the business of the bankrupt and said trustee was not, subsequent to May 26, 1952, operating said property or business within the meaning of Section 52 of the Internal Revenue Code.

It is further ordered, adjudged and decreed that the trustee is not liable for income taxes on receipts by him subsequent to May 26, 1952.

It is further ordered that the claim of the Director of Internal Revenue for additional income taxes for the calendar year 1952 be and it is hereby disallowed.

Dated: March 24th, 1954.

/s/ HUGH L. DICKSON,
Referee

Approved as to Form: Laughlin E. Waters, U. S. Attorney; E. R. McHale, Asst. U. S. Attorney; signed by Eugene Harpole, Special Attorney, Internal Revenue Service. [20]

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

MOTION AND ORDER EXTENDING TIME
TO FILE PETITION FOR REVIEW

Comes Now the United States of America by and through its attorneys Laughlin E. Waters, United States Attorney for the Southern District of California; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, for said District, and Eugene Harpole, Special Attorney, for the Internal Revenue Service, and moves the Referee that the time within which the United States of America or Robert A. Riddell its District Director of Internal Revenue at Los Angeles, California, may file a Petition for Review of the Referee's Order of March 24, 1954, disallowing the claim of the Director of Internal Revenue for 1952 income tax, be extended from April 3, 1954 to and including April 30, 1954.

Dated: March 31, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax
Division

EUGENE HARPOLE,
Special Attorney, Internal Revenue Service

/s/ EUGENE HARPOLE,
Attorneys for United States of America and the
District Director of Internal Revenue.

It Is So Ordered this 31 day of March, 1954.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy [21]

[Endorsed]: Filed March 31, 1954.

[Title of District Court and Cause.]

MOTION AND ORDER EXTENDING TIME
TO FILE PETITION FOR REVIEW

Comes Now the United States of America by and through its attorneys Laughlin E. Waters, United States Attorney for the Southern District of California; Edward R. McHale, Assistant United States Attorney, Chief, Tax Division, for said District, and Eugene Harpole, Special Attorney, for the Internal Revenue Service, and moves the Referee that the time within which the United States of America or Robert A. Riddell its District Director of Internal Revenue at Los Angeles, California, may file a Petition for Review of the Referee's Order of March 24, 1954, disallowing the claim of the Director of Internal Revenue for 1952 income tax, be extended from April 30, 1954 to and including June 1, 1954.

Dated: This 28 day of April, 1954.

LAUGHLIN E. WATERS,
United States Attorney
EDWARD R. McHALE,
Asst. U. S. Attorney

EUGENE HARPOLE,
Special Attorney, Internal Revenue Service

/s/ EUGENE HARPOLE,
Attorneys for United States of America and the
District Director of Internal Revenue.

It Is So Ordered this 29 day of April, 1954.

/s/ DAVID B. HEAD,
Referee in Bankruptcy [22]

[Endorsed]: Filed April 29, 1954.

[Title of District Court and Cause.]

PETITION FOR REVIEW OF THE REFEREE'S ORDER OF MARCH 24, 1954, DISALLOWING THE CLAIM OF THE DIRECTOR OF INTERNAL REVENUE FOR 1952 INCOME TAXES

Comes Now the United States of America, by and through its attorneys, Laughlin E. Waters, United States Attorney, Edward R. McHale, Assistant United States Attorney, and Eugene Harpole, Special Attorney, Internal Revenue Service, and files this its petition for review of that certain order made and entered in the above entitled proceeding on the 24th day of March, 1954, which as follows: to-wit:

[Title of District Court and Cause.]

Order Disallowing Claim of Director of Internal
Revenue for 1952 Income Taxes

“The objections of the trustee to the claim of the Director of Internal Revenue for Income taxes for the year 1952 in the amount of \$11,391.21 came on regularly for hearing on March 18, 1954, before the Honorable Hugh L. Dickson, Referee in Bankruptcy. The trustee appeared by George Bouchard, his Special Tax Counsel and the Director of Internal Revenue appeared by Eugene M. Harpole, his attorney. The parties have filed a written stipulation of facts which the court adopts [23] as its findings of fact and, having heard the arguments of counsel and being fully advised in the premises, hereby makes it order as follows:

“It is ordered, adjudged and decreed that the order of liquidation of the referee dated May 26, 1952, terminated the trustee’s authority to conduct the business of the bankrupt and said trustee was not, subsequent to May 26, 1952, operating said property or business within the meaning of Section 52 of the Internal Revenue Code.

“It is further ordered, adjudged and decreed that the trustee is not liable for income taxes on receipts by him subsequent to May 26, 1952.

“It is further ordered that the claim of the Director of Internal Revenue for additional income

taxes for the calendar year 1952 be and it is hereby disallowed.

“Dated: March 24, 1954.

“Hugh L. Dickson, Referee

“Approved as to Form: Laughlin E. Waters, U. S. Attorney, E. R. McHale, Asst. U. S. Attorney; by Eugene Harpole, Special Attorney, Internal Revenue Service.”

In this Petition for Review the United States of America alleges that the Referee in Bankruptcy erred in his said Order of May 24, 1954, in the following respects:

I.

That the Referee in Bankruptcy erred in disallowing the claim filed on January 7, 1954 by Robert A. Riddell, District Director of Internal Revenue for the Los Angeles District of California, on behalf of the United States of America for Federal income taxes for the taxable year 1952 in the sum of \$11,970.13, for the reason that said taxes were lawfully due to the United States upon the net income realized by the Bankrupt's estate from the operation of its property or business during said year.

II.

That the Referee in Bankruptcy erred in failing and refusing to hold that the trustee in bankruptcy was, during the taxable year 1952, operating [24] the property or business of F. P. Newport Corporation, Ltd., the bankrupt, within the meaning

of Section 52(a) of the Internal Revenue Code and Section 39.52-2 of Treasury Regulations 118.

III.

That the Referee in Bankruptcy erred in holding that the net income of \$32,483.09 determined by the Commissioner of Internal Revenue to have been received by said bankrupt's estate and its trustee in bankruptcy during the calendar year 1952 was not subject to federal income tax within the meaning of Section 52(a) of the Internal Revenue Code.

IV.

That the Referee in Bankruptcy erred in failing to allow the claim filed January 7, 1954, on behalf of the United States of America for 1952 income taxes in the sum of \$11,970.13.

Wherefore, your Petitioner prays that said order be reversed and that said claim for 1952 income taxes be allowed as filed, and the Trustee in Bankruptcy directed to pay the same in the sum of \$11,970.13 together with interest as provided by law forthwith.

Dated: May 7, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

EUGENE HARPOLE,

Special Attorney, Bureau of In-
ternal Revenue

/s/ By EUGENE HARPOLE,

Attorneys for United States of
America

[25]

Affidavit of Service by Mail attached.

[26]

[Endorsed]: Filed May 12, 1954.

[Title of District Court and Cause.]

CERTIFICATE ON REVIEW OF REFEREE'S
ORDER DISALLOWING FEDERAL TAX
CLAIM

At the request of Hugh L. Dickson, a Referee in Bankruptcy of this Court, and pursuant to Bankruptcy Rule No. 209a of this Court, the undersigned Referee in Bankruptcy presents to the Court his Certificate on Review of the Order of Referee Dickson made and entered herein on March 24, 1954, disallowing the claim of the United States for income taxes in the sum of \$11,970.13.

Laughlin E. Waters, Edward R. McHale, Eugene Harpole, Attorneys for United States of America.

Norman A. Bailie, Attorney for Trustee.

George Bouchard, Special Tax Counsel for Trustee.

I. Statement of the Case

The previous history of this case is set forth in detail in the undersigned Referee's opinion of April

20, 1954, in connection with the sale of the assets of the bankrupt estate, except cash on [27] hand to R. T. Colter and Robbie E. Colter, his wife, as joint tenants, which said opinion is on file with the Clerk of this Court in connection with a petition to review the order of the undersigned Referee confirming such sale. On May 12, 1954 Referee Dickson filed and entered his order disallowing a claim of the Director of Internal Revenue of the United States of America for income taxes for the year 1952 in the sum of \$11,391.21. Thereafter, and on May 12, 1954, and within the limit of extensions of time granted by Referee Dickson, the said United States of America filed herein its petition for a review by the Judge of the said Referee's order of March 24, 1954. Thereafter, and on May 13, 1954, the said United States of America filed herein its praecipe for the Referee's Certificate on Review.

II. Statement of the Evidence

A stipulation of facts agreed to by the parties, signed March 18, 1954, and filed March 24, 1954, covers this subject.

III. Question Presented

The sole question presented is whether or not the Trustee operated a business within the meaning of Sec. 52 of the United States Internal Revenue Code after May 26, 1952, the date when the authority of the Trustee in Bankruptcy of the estate to conduct the bankrupt's business was terminated and an order of liquidation was entered.

IV. Findings of Fact, Conclusions of Law and Order

These are set forth in the order entered herein on May 12, 1954. [28]

V. Documents Accompanying This Certificate

1. Claim of Director of Internal Revenue for Deficiency in 1952 income taxes, filed Jan. 7, 1954.

2. Objections to claim of United States for taxes, filed Feb. 5, 1954.

3. Stipulation of facts in connection with claim for 1952 income taxes filed Mar. 24, 1954.

4. Order disallowing claim for 1952 income taxes, filed Mar. 24, 1954.

5. Motion and Order extending time to file petition for review, filed Mar. 31, 1954.

6. Motion and order extending time to file petition for review filed Apr. 29, 1954.

7. Petition for review of Referee's order of Mar. 24, 1954, filed May 12, 1954.

8. Praecipe for Referee's certificate on review filed May 13, 1954.

Note: United States of America requests to be sent up by the Certificate on Review a Stipulation of facts between counsel for H. F. Metcalf (the then Trustee in Bankruptcy) and the United States, dated Dec. 30, 1940, and its exhibits. This stipulation is not in either Referee's files and may be on file with the Clerk of the Court in connection with a review taken about that time which ultimately resulted in the decision of *U. S. vs. Metcalf*, CCA 9, 51 ABR. NS. 727, 131 F.(2d) 677, or may be on

file with the Clerk of the Court of Appeals, or at least is contained in the Transcript on Appeal in that case.

Dated: June 2, 1954.

/s/ REUBEN G. HUNT,
Referee in Bankruptcy [29]

[Endorsed]: Filed June 2, 1954.

[Title of District Court and Cause.]

STIPULATION OF FACTS

It Is Hereby Stipulated and Agreed by and between H. F. Metcalf, as Trustee in Bankruptcy of the above named bankrupt corporation, and the United States of America and Nat Rogan, its Collector of Internal Revenue, through their undersigned counsel, respectively, that for the purpose of ruling upon the objections of the Trustee in Bankruptcy hereto filed to the claim for income taxes presented on behalf of the United States of America by Nat Rogan, Collector of Internal Revenue, for the sum of \$19,363.65 for the taxable years 1938 and 1939, the following facts may be taken as true:

I.

The Commissioner of Internal Revenue determined deficiencies of \$14,365.96 and \$4,997.69 in the bankrupt's Federal income tax for the calendar

years 1938 and 1939, respectively. Notice of the Commissioner's determination was sent to "F. P. Newport Corporation, Ltd., H. F. Metcalf, Trustee in Bankruptcy, 216 Central Building, 108 West Sixth Street, Los Angeles, California" by registered mail on July 13, 1940. On July 22, 1940, Nat Rogan, as United States Collector of Internal Revenue for the Sixth Collection District of California, filed a claim in the above entitled bankruptcy proceeding on behalf of the United States for the sum of \$19,363.65, representing the amount of alleged deficiencies in income tax so determined by the Commissioner of Internal Revenue for the taxable years 1938 and 1939. On September 28, 1940, the Trustee in Bankruptcy filed an objection to the allowance of said claim.

II.

The bankrupt, F. P. Newport Corporation, Ltd., was organized under the laws of the State of Delaware on December 2, 1929, and it afterward qualified to do business in the State of California. It was engaged in the real estate business in the State of California prior to March 19, 1935. In the conduct of said business it purchased large tracts of [31] unimproved lands, subdivided portions of them into city lots, installed the essential public improvements and then endeavored to sell the lots, and did sell a great many of them. It also acted as a selling agent for many parcels of real property owned by other persons. It conducted its business for the purpose of making a profit.

III.

On March 19, 1935, an involuntary petition in bankruptcy was filed against F. P. Newport Corporation, Ltd., in the United States District Court for the Southern District of California, Central Division, in case numbered 25,308-M, Bankruptcy. A receiver was thereupon appointed by the Court. All of the assets and affairs of F. P. Newport Corporation, Ltd., were placed in the possession and control of said receiver. The receivership continued until January 12, 1937, when the corporation was adjudicated a bankrupt. H. F. Metcalf was appointed Trustee in Bankruptcy on March 18, 1937, and at all times since has been in possession and control of all the property and assets of the bankrupt.

IV.

The properties and assets received from the bankrupt by its Trustee consisted of numerous parcels of real estate, both improved and unimproved, and other assets consisting of accounts, promissory notes, bills receivable and other tangible and intangible property. [32]

V.

At the date of bankruptcy record legal title to approximately ninety per cent of the real properties received by the Trustee in Bankruptcy stood in the name of the Security-First National Bank of Los Angeles, in trust, as security for an indebtedness owing said bank by said F. P. Newport Corporation, Ltd., as evidenced by a written declaration of trust numbered D-7224, formerly numbered

SS-70401, signed by the Bank, approved by the bankrupt, on March 1, 1930. At the date of filing the petition in bankruptcy said indebtedness exceeded \$1,300,000.00. Said bank filed a claim in the bankruptcy proceeding as an unsecured creditor in the amount of \$500,000.00, after crediting what it determined to be the value of the security held by it upon the indebtedness of F. P. Newport Corporation, Ltd. Claims filed against the bankrupt estate other than the claim of said bank exceed in all the sum of \$295,000.00, none of which have been paid by the Trustee in Bankruptcy, either in whole or in part.

VI.

For the purpose of avoiding a forced sale of said real properties and with the object of obtaining time within which to liquidate the properties at a fair value, a contract was made and entered into by and between Security-First National Bank of Los Angeles, F. P. Newport Corporation, Ltd., the bankrupt, and the Trustee in Bankruptcy with the [33] approval of this Court. A copy of said agreement, with the supplements thereto and modifications thereof is hereby attached, marked Exhibit "A" and by reference made a part hereof.

VII.

Among the real properties title to which is so held by said bank under said Declaration of Trust are two parcels—one of three and the other of six acres, separated by an intervening three-acre parcel belonging to third persons. Both parcels are sit-

uated adjacent to what is known as Channel No. 3 of Long Beach Harbor in the City of Long Beach, California. During the pendency of the bankruptcy proceeding producing oil and gas wells were drilled and other wells were being drilled or about to be drilled on nearby lands which adjoined and surrounded said two parcels. It was feared by the Trustee and said Security-First National Bank that the operation of these wells would drain away the oil and gas believed by the trustee to underlie the same. The Trustee in Bankruptcy did not have sufficient funds to enable him to drill any oil or gas wells. By and with the approval of the Court, he leased the said two parcels of land to Universal Consolidated Oil Company, a copy of which lease is attached to the Trustee's Petition for Authorization, Approval and Confirmation of an Oil and Gas Lease, and for Order to Show Cause, filed with the Court on January 14, 1938, reference to which is hereby made for further particulars, and the same is made part [34] hereof by said reference. Other lots in the same general area which were not of sufficient size to be covered by separate leases, were included in a community oil and gas lease wherein the Bankline Oil Company was the lessee.

VIII.

Oil and gas royalties, including bonuses actually paid to the Trustee under said leases during the year 1938 amounted to \$245,517.65 and during the year 1939 amounted to \$206,333.36. These moneys were paid to the bank by the Trustee upon orders

of Court to cover taxes assessed against the properties, costs of engineering services and checking oil and gas production and to apply on account to the interest and principal owing the said bank by the bankrupt.

IX.

From the sales of real estate made during 1938 the Trustee received \$5,500.00 and during 1939 \$18,650.00 from the same source. Eighty per cent of the moneys so obtained were paid to the bank by the Trustee upon order of the Court to apply on account of the principal and interest owing said bank. Twenty per cent of said receipts were retained by the Trustee and used by him in payment of expenses of administration.

X.

The Trustee in Bankruptcy has endeavored at all times since his appointment to sell various [35] properties of the bankrupt at prices commensurate with their value. Due to depressed market conditions, sales have been slow. The indebtedness of the estate is considerable and the Trustee has believed it to be to the best interest of the creditors not to sacrifice the properties by an immediate sale under the aforesaid conditions and, accordingly, has conducted a selling program which would enable him to spread his sales over a period of time and take advantage of favorable market conditions. All sales made by said Trustee were duly approved by order of Court. Pending sale, some of the properties (other than the properties covered by the oil leases

hereinbefore mentioned) have been rented by the Trustee mainly for agricultural purposes.

XI.

It was necessary for the Trustee from time to time to make repairs upon certain of the properties and to make or have made certain improvements on some properties to preserve them from hazards of fire and flood.

XII.

The Trustee in Bankruptcy has participated in all of the transactions set forth in his First, Second, Supplemental Second and Third Reports and Accounts filed on March 29, 1938, December 8, 1938, December 22, 1938, and October 31, 1939, respectively. He has not engaged in the purchase or subdivision of real property nor acted as a selling agent for owners of property. [36]

XIII.

No general order of the Court authorizing the Trustee to conduct the business of the bankrupt corporation or forbidding him to do so has ever been made or signed. The Court has made orders authorizing the Trustee to make leases of agricultural lands, grant easements, rights of way for streets, make sales of real property, cancel leases of real property, make payments upon the indebtedness of the bankrupt, compromise claims against the bankrupt, to enter agreements with the City of Long Beach, California, concerning rights to oil and gas produced under the Universal Consolidated Oil

Company lease hereinbefore mentioned pending determination of title disputes, to renew contracts with the Oil Field Testing and Engineering Company, Inc., and to lease a barn belonging to the bankrupt estate for the storage of hay.

XIV.

The Trustee in Bankruptcy has kept books of account and filed with the Collector of Internal Revenue a statement of his receipts and disbursements for the years 1938 and 1939, with the notation that there had been and was no taxable income for said years or either of them. The Internal Revenue Agent thereafter examined the Trustee's books and the Commissioner of Internal Revenue made his assessments, represented by his alleged claim on file herein upon figures compiled by said Agent from the Trustee's records as follows: [37]

1938

RECEIPTS

By sales of real estate approved by Court.....	\$ 5,500.00
Interest on bankrupt's accounts.....	203.80
Rents collected from miscellaneous properties.....	4,557.98
Ranch rentals	1,792.50
Collected on bankrupt's old accounts.....	2,007.00
Cash bonus (Universal Consolidated Oil Co. lease).....	25,000.00
Oil bonus (Universal Consolidated lease).....	25,000.00
Oil and gas royalties.....	195,517.65
Total	<u>\$259,578.93</u>

DEDUCTIONS ALLOWED BY COMMISSIONER

Bankrupt's costs on real estate sold.....	\$ 4,470.60
Commissions to brokers on sales.....	275.00
Trustee's branch office expenses.....	407.34
Verdugo tract upkeep expenses.....	126.53

Other properties upkeep expenses.....	729.71
Ranch upkeep expenses.....	191.30
Title expenses Re: Sales made.....	74.10
Interest paid Security-First National Bank.....	50,773.40
Taxes paid on properties	21,705.76
Trustee's office rent	1,440.00
Telephone and telegraph	394.50
Office supplies and expenses.....	885.58
Salaries of Trustee's assistants.....	5,145.01
Miscellaneous expenses including Trustee's bond.....	262.99
Other expenses (Loss of assets through foreclosure)....	1,735.56
Depreciation on office fixtures and equipment.....	614.52
Depletion (oil)	67,517.35
Expense of checking oil and gas production on prop- erties leased to Universal.....	1,920.73
Bankruptcy fees allowed by Court.....	13,842.53
 Total	 \$172,512.51
 Commissioner's Determination of Net Income.....	 \$ 87,066.42

1939

RECEIPTS

By sales of real estate approved by Court.....	\$ 19,450.00
Interest on contracts for sales of real estate.....	17.53
Rents from miscellaneous properties.....	4,650.76
Ranch rentals	2,038.75
Other receipts by sales from miscellaneous personal properties	81.00
 Oil and gas royalties	 \$206,333.36
 Total	 \$232,571.40

DEDUCTIONS ALLOWED BY COMMISSIONER

Cost of real estate sold.....	\$ 30,770.40
Commissions to brokers on sales.....	1,256.50
Trustee's branch office expenses.....	1,418.98
Verdugo tract upkeep expenses.....	178.82
Ranch upkeep expenses	235.46
Other property upkeep expenses.....	1,462.30
Title expenses Re: sales made.....	424.70

Interest paid to Security-First National Bank.....	46,892.48
Taxes on properties	37,304.67
Trustee's office rent	320.00
Telephone and telegraph	334.06
Office supplies and expenses.....	1,173.81
Salaries to Trustee's assistants.....	4,727.53
Miscellaneous expenses including Trustee's bond.....	130.29
Expenses of checking production under Universal Consolidated oil lease	3,982.50
Depreciation on office fixtures and equipment.....	621.50
Depletion (oil)	56,741.67
Bankruptcy fees allowed by Court.....	14,306.82
<hr/>	
Total	\$202,282.41
<hr/>	
Commissioner's determination of net income.....	\$ 30,288.99

Dated: This 30th day of December, 1940.

WM. FLEET PALMER E.H.

United States Attorney

E. H. MITCHELL E.H.

Asst. U. S. Attorney

EUGENE HARPOLE,

Special Attorney, Bureau of Internal Revenue

Attorneys for United States of America and Nat Rogan, Collector of Internal Revenue

BAILIE, TURNER & LAKE,

By ALLEN T. LYNCH,

Attorneys for H. F. Metcalf, Trustee in Bankruptcy of F. P. Newport Corporation, Ltd., Bankrupt.

Approved:

H. F. METCALF, Trustee.

December 27, 1940. [40]

EXHIBIT "A"

AGREEMENT

This Agreement, made and entered into this 12th day of January, 1937, by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bankrupt, H. F. Metcalf, as Receiver for F. P. Newport Corporation, Ltd., an alleged bankrupt, hereinafter called the Receiver, and Security-First National Bank of Los Angeles, a National Banking Association, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bank.

Witnesseth:

Recitals:

The Bankrupt is indebted to the Bank for money loaned to the Bankrupt, or advanced for its use, under the terms of the Trust Declaration, hereinafter referred to, and for costs and expenses incurred by the Bank in connection therewith, in the following sums, to wit:

1. Unpaid principal, evidenced by promissory notes executed by the Bankrupt to the Bank.....	\$1,013,928.78
2. Interest on said notes up to February 1, 1937.....	219,887.25
3. Trust advances for benefit of the Trust Estate, under the terms of said Trust.....	105,365.93
4. Interest on said Trust advances to February 1, 1937	9,871.75
5. Necessary costs and expenses incurred by the Trustee in connection with the preservation of the Bank's security for its indebtedness.....	2,402.67
6. Interest thereon to February 1, 1937.....	273.00
Total.....	<hr/> \$ 1,351,729.38

Exhibit "A"—(Continued)

All of said indebtedness is secured by the property conveyed by the Bankrupt to the Bank, as Trustee, in Trust with power of sale, to secure the same, and by a Pledge by the Bankrupt of the entire beneficial interest in and to the said Trust. Said Trust is evidenced by a written Declaration of Trust No. D 7224, formerly numbered as SS 70401, signed by the Bank under date of March 1, 1930, and approved on said date by the Bankrupt. Reference is hereby made to said Declaration of Trust for the full terms and conditions thereof.

All of said indebtedness is long overdue, and no interest on said indebtedness has been paid by the Bankrupt for several years and all taxes and assessments on the Trust properties have been advanced by the Bank for several years.

An involuntary Petition to have the Bankrupt adjudicated a Bankrupt, has been pending since the month of March, 1935. Said Petition is at issue, but is still undecided.

Upon the filing of said involuntary Petition in Bankruptcy, to wit: on or about the 27th day of March, 1935, the Bankruptcy Court before which said Petition was pending, issued its Order restraining and enjoining the Bank from foreclosing [42] its said security for said indebtedness. Said restraining order is now, and ever since said date has remained in full force and effect.

On or about the 27th day of March, 1935, the Court appointed the above named Receiver, H. F. Metcalf, as Receiver in Bankruptcy, for properties

Exhibit "A"—(Continued)

of the Bankrupt, and he thereupon duly qualified and ever since said date has been, and now is, acting as such Receiver.

The Bankrupt and the Receiver are desirous of further postponing the foreclosure by the Bank of said security, for nonpayment of said indebtedness, and are desirous of starting the immediate liquidation of said indebtedness of the Bank, by the sale of certain of the real properties held by the Bank in said above referred to Trust.

The Bank is willing to delay further the foreclosure of the said security and will agree to the immediate sale of certain of the assets in said Trust on the terms, and subject to the conditions hereinafter contained, and not otherwise, hence this Agreement.

The Agreement

Order of Court Allowing Receiver to Execute Required.

The Receiver agrees to petition the Bankruptcy Court forthwith for leave to execute this agreement. Should the Court refuse to grant leave to the Receiver to so execute this agreement, and thereafter the Receiver fail to execute it, the Bank, at its [43] election, shall have the right to cancel this agreement.

Adjudication of Bankruptcy Required.

The Bankrupt, F. P. Newport Corporation, Ltd., agrees that it will make no resistance whatever in the pending petition to have it declared a bankrupt, said Petition and Answer now being set for hearing

Exhibit "A"—(Continued)

on January 12, 1937, before the Honorable Paul J. McCormick, Judge of the Bankruptcy Court. It is understood and agreed that unless a Decree adjudicating said corporation a Bankrupt be entered prior to the 15th day of January, 1937, and that said order thereafter become final without appeal, that this contract, at its option, may be terminated and cancelled by the Bank.

Approval by Trustee and Court.

Immediately upon a Trustee in Bankruptcy being appointed by the Court in said proceeding, this contract shall be presented, by proper petition of the Trustee, to the Bankruptcy Court, for its approval, and for an order authorizing the said Trustee in Bankruptcy to become a party thereto and be bound by the terms and conditions thereof. The approval of the said Bankruptcy Court and the due execution of this Contract by the said Trustee shall be conditions precedent to the said contract continuing as a binding and effective obligation on the Bank, and should said Court refuse to approve this agreement, or should the Trustee fail to execute the same, and become bound by all of the terms and conditions [44] thereof within five (5) days after the order approving the same has been entered, then this contract shall become utterly void and of no further force and effect, and the Bank shall be relieved of any and all obligations thereunder.

Reduction of Indebtedness.

Provided the above conditions are complied with, the Bank agrees to reduced the amount of the debt

Exhibit "A"—(Continued)

due it from the Bankrupt, as of the first day of February, 1937, to the sum of \$1,270,451.12, and to waive the difference between the amounts due as of said date, and said sum of \$1,270,451.12.

Reduction of Interest.

The said sum of \$1,270,451.12 shall bear interest, from February 1, 1937, at the rate of four per cent (4%) per annum, payable quarterly, and if not so paid, to bear like interest as the principal. It is agreed, however, that the first installments of interest shall be payable on August 1, 1937.

The principal of said indebtedness shall be payable as follows:

1. \$35,000.00 on or before six months from February 1, 1937.
2. \$65,000.00 on or before 12 months from February 1, 1937.
3. \$250,000.00 on or before 24 months from February 1, 1937.
4. \$150,000.00 on or before 30 months from February 1, 1937. [45]
5. The balance of said indebtedness on or before thirty-six (36) months from February 1, 1937.

Foreclosure of Security for Breach of Agreement.

So long as all of the terms and conditions of this agreement are complied with by the other parties hereto, the Bank agrees not to foreclose the security held for the payment of said indebtedness.

It is distinctly understood and agreed, however, that should any installment of principal or interest

Exhibit "A"—(Continued)

be not paid as herein provided, or any taxes or assessments, be not paid ten days prior to the delinquency thereof, or any of the terms and conditions of this agreement and the Declaration of Trust, herein referred to, be not complied with in the manner and at the times herein, and in said Declaration of Trust provided, that the Bank, except as otherwise provided for herein, may at its option call immediately due and payable the entire amount of the indebtedness then owing by the Bankrupt, or the Bankrupt Estate, and may immediately foreclose the security held by it, by such procedure as is provided for in said Declaration of Trust, or may foreclose the same by an action in court; provided, however, that the Bank expressly waives the right to foreclose the beneficial interest in said Trust as a pledge, as provided for in said Declaration of Trust, and also waives the provision of said trust contained on page 12 commencing in line 23 with the word "or" and up to and including the word "code" in line 27. Notwithstanding anything [46] to the contrary herein contained, it is agreed that the Bankrupt, or the Trustee in Bankruptcy shall have sixty (60) days after written notice within which to remedy any default for which notice has been given, before the Bank shall have the right to accelerate deferred payments of said indebtedness, and commence foreclosure of said security. The said sixty day notice herein provided for, shall be deemed the sixty day notice provided for in said declaration of Trust.

Exhibit "A"—(Continued)

Waiver of Statute of Limitations.

In consideration of the execution of this agreement, the Bankrupt, the Receiver and the Trustee, when appointed, qualified, and upon becoming a party hereto, expressly waive the provisions of any statute limiting the time when any action may be brought by the Bank on the indebtedness hereinabove referred to, or hereinafter incurred pursuant to the terms of this agreement and/or the Trust herein referred to.

Waiver of Defenses in Foreclosure.

It is understood that one of the principal considerations moving to the Bank in this agreement is the willingness of the other parties hereto to waive any and all defenses they may claim to have to the foreclosure of the security held by the Bank, other than as to the correct amount claimed to be due the Bank. It is, therefore, expressly agreed that, provided the debt be then due, as provided for herein, in any foreclosure proceeding brought pursuant to [47] the terms of said Declaration of Trust, and/or this agreement, no defense thereto will be made, other than to determine the correct amount remaining due and unpaid from the Bankrupt to the Bank, at the time of said foreclosure. And it is expressly agreed that the parties hereto will not seek to enjoin or delay such foreclosure, if and when brought by the Bank.

To enable the Trustee, hereinafter appointed, to make the payment of taxes, assessments, interest and principal herein provided to be made at the

Exhibit "A"—(Continued)

time herein specified, and to do all other things herein agreed to be done, it is understood and agreed that the Trustee may negotiate for the immediate sale of certain parcels of real property now held in said Trust, and described in a Schedule annexed hereto, marked Exhibit "A", and hereby referred to and made a part hereof.

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

All contracts for the sale of said property shall be issued by the Bank. All payments for any of the Trust property shall be made to the Bank. [48]

Release Price Agreed Upon.

In this connection, the Bank agrees, provided no default exists which has not been cured within sixty (60) days, as Provided for Herein, to convey the above described parcels of said property to such purchaser or purchasers as the Trustee in Bankruptcy may direct, when there shall have been paid to the Bank, as release prices thereon, the amount of money agreed upon by the parties hereto, and set forth in Exhibit "A" attached hereto; provided, however, that where the Bank shall have executed

Exhibit "A"—(Continued)

and delivered a contract of sale for any part or portion of said property to any third party, no release, transfer or conveyance thereof shall be demanded for said property other than to the Buyer thereof under said contract, so long as said sales contract remains outstanding.

Release Price Credited Only on Principal.

All sums received on the release price of said property shall be credited upon only the principal of the Bankrupt's obligations to the Bank; it being expressly agreed that all payments of interest, taxes and assessments and further Trust Advances and expenses, except as hereinafter provided, shall be made by the Trustee in Bankruptcy from funds otherwise in the Bankrupt's estate, or from funds, if any, in the hands of the Bank, as Trustee, as hereinafter provided.

Distribution of Proceeds from Sales.

Out of the first money paid to the Bank, on any sale of said Trust Properties, there shall first be [49] paid all costs of sale, including commissions and Title Charges, not to exceed, however, twenty per cent (20%) of the sale price of said property.

The Special Fund.

All moneys thereafter received on said sales contracts shall be placed by the Bank in a special fund until the amount of the principal remaining due on said sales contract equals the amount of the release price agreed upon for the parcel of property so sold.

Thereafter all such payments, shall be applied

Exhibit "A"—(Continued)

upon the principal of the indebtedness owing to the Bank of the Bankrupt until the release price has been fully paid.

All interest on any contract or Trust Deed note shall, when received, be placed by the Bank in the Special Fund.

Disbursement of the Special Fund.

Out of the Special Fund, the Bank shall pay all taxes, assessments, insurance, interest and other charges and expenses of said Trust No. D7224 not theretofore paid by the Trustee in Bankruptcy. After payment out of said Special Fund of all current interest, taxes, assessments and Trust Expense, and after first setting aside in said Special Fund a reserve sufficient to pay all interest, taxes, assessments and Trust Expenses for one additional year, the remainder of the money in said Special Account shall be paid over to the Trustee in Bankruptcy. [50]

Use of Paper to Meet Quotas on Principal.

Although installment payments on the principal of the Bankrupt's agreed obligations have been hereinabove provided to be made on specific dates, it is, nevertheless, understood and agreed that said payments or quotas of the debt will be deemed to have been met, provided that for such portion thereof as shall not have been paid in cash, the Bank shall hold, as trustee of said Trust, Sales Contracts, or First Trust Deeds received from the sale of said real estate sufficient in amount so that the release prices payable thereon shall equal the

Exhibit "A"—(Continued)

amount of the unpaid portion of the said principal payments or quotas. The Bank reserves the right to approve or disapprove of said paper for this purpose, but such right shall not be exercised in an arbitrary or unreasonable manner.

Such paper, so approved by the Bank, for said purpose, shall only be available for said purpose so long as it remains in good standing, and without any delinquency in the payments thereon. Should any such paper become delinquent in any respect, the Trustee in Bankruptcy shall have sixty (60) days after notice thereof, to effect a reinstatement thereof or to provide new paper acceptable to the Bank in lieu thereof. Failure to so reinstate said paper or to replace the same, or to pay in cash the amount for which it has been accepted on the quotas, shall constitute a breach of this agreement, entitling the Bank to proceed with the foreclosure [51] of its security without giving any additional notice of such breach of agreement.

Such paper shall not be accepted by the Bank as payment on said indebtedness, but only as security therefor.

Temporary Collection of Rents by Trustee in Bankruptcy.

Although the Bank, under the express terms and conditions of said Trust No. D7224, is entitled to execute all leases for Trust Property, and to demand and receive all rents, issues and profits from the properties held by it in Trust, the Bank agrees that, for a period of one (1) year from the first

Exhibit "A"—(Continued)

day of February, 1937, the Receiver, and after his appointment, the Trustee in Bankruptcy, may collect and use all such rents, issues and profits, except the rents, issues and profits from oil, as hereinafter provided, up to a maximum of seven thousand dollars (\$7,000.00). All excesses above said sum to be promptly paid over to the Bank to be applied upon such of the obligations due the Bank by the Bankrupt as the Bank may elect to apply them upon. It is, however, expressly agreed that hereafter all leases and rental agreements shall be made and executed by the Bank, as provided for in said Trust Declaration.

Should there not be paid over to the Trustee in Bankruptcy out of the Special Fund, as hereinabove provided, the sum of \$7,000.00 during the second year, then out of the said rents, issues and [52] profits from said real property there shall be paid over to said Trustee in Bankruptcy sufficient to equal the said sum of \$7,000.00.

Oil Income and its Distribution.

The right to collect such rents, issues and profits by the Trustee in Bankruptcy, as is provided for herein, shall be expressly subject to the condition that any rents, issues and profits from any of said property for bonuses, rentals, or royalties for or from any oil lease thereon, shall be collected only by the Bank, and shall in no event be paid over to, or collected by said Trustee in Bankruptcy.

All income from oil, in the nature of bonuses, rentals and royalties from any of the properties

Exhibit "A"—(Continued)

held by the Bank in Trust, so paid to the Bank, shall be placed by the Bank in a Special Oil Account.

The funds in said Account shall be available to the Trustee in Bankruptcy for the purpose of making up any deficiency in the "Special Fund," to pay interest, taxes, assessments and expenses, as hereinabove provided, in order to obviate a default; provided, however, that all sums taken from said Oil Account for such purpose shall be repaid to said Oil Account from moneys thereafter coming into Special Fund and not needed to pay other or additional interest, taxes, assessments, or expenses then due.

Except as herein provided, all amounts in said account, shall be applied on September first and [53] March first of each year, or on such other dates as shall be mutually agreed upon by the Trustee in Bankruptcy and the Bank, on the principal of said indebtedness, and shall be considered as cash applied on the quotas of principal as hereinbefore set forth.

The said Declaration of Trust provides that the Bank may pay, purchase, contract or compromise any claims, liens, or incumbrances which in its judgment appear to effect said property or the Trust.

Payment of Claims Against Harbor Property.

Pursuant thereto, it is understood and agreed

Exhibit "A"—(Continued)

that the Bank may in its discretion, purchase, settle, or compromise, the claim of any and all third persons claiming an interest in or to the Long Beach Harbor Tract, lying on Channel No. 3 of the Long Beach Harbor, or in or to any proceeds from the sales thereof, and to that end may make all necessary advances to accomplish said purposes, and all such advances shall become a part of the principal of the Bankrupt's indebtedness and shall bear interest at the rate of four per cent (4%) per annum. It is understood that the claims referred to arise out of a certain contract or agreement known as the Syndicate No. 1 Agreement between F. P. Newport and certain third parties who furnished a portion of the purchase price of said property. [54]

No Dividends to General Creditors Pending Sale of Trust Property.

Since it is contended by the Bank that the security held by it is insufficient to pay the Bankrupt's obligations, and that it will, therefore, probably become an unsecured creditor for a substantial deficiency, it is expressly agreed that no liquidating dividends shall be paid to the creditors of said Bankrupt Estate until all of the Security held by the Bank shall have been sold, and the amount of such deficiency shall be ascertained, to the end that the Bank may participate in such dividends, if any. Provided, however, that nothing herein contained shall be deemed to prevent the Trustee in Bankruptcy from paying such amounts as may be neces-

Exhibit "A"—(Continued)

sary to clear the title to any property not covered by the trust.

Upon the execution of this agreement by the Trustee in Bankruptcy, all defaults existing shall be deemed to have been waived by the Bank.

Overlapping Quotas to Apply.

Should payments in excess of any one quota of principal be made prior to the due date thereof, such excess payments shall be construed as applying on the next maturing quota of principal.

Notwithstanding anything to the contrary herein provided, it is agreed that, upon any default occurring, and which shall not be cured within sixty (60) days from date of notice as hereinabove provided, no further or additional money in any fund [55] or funds held by the Bank shall be paid out of the Trust by the Bank, but all such sums of money held in any such fund shall be applied by the Bank, at its option, on any indebtedness then due the Bank.

Notwithstanding anything hereinabove to the contrary, the Bank agrees to advance and pay, prior to delinquency, the second installment of taxes for the year 1936-37 on the property held by it in said Trust No. D7224. All money so advanced shall draw interest at the rate of 4% per annum, payable quarterly, and if not so paid shall bear like interest as the principal of said advances.

Exhibit "A"—(Continued)

Such advances shall be repaid to the Bank out of any money held by it in the "Special Fund", provided such fund shall have in it at all times sufficient money to assure the payment of the installment of interest falling on August 1, 1937.

It is agreed, however, that if there is sufficient money in the "Special Fund" to pay said taxes and to assure the payment of the installment of interest falling due on August 1, 1937, then the Bank shall be under no obligation to advance and pay said taxes.

The terms and conditions of the above-mentioned Declaration of Trust No. D7224 shall be and they hereby are modified to conform to the terms and conditions hereof.

Other than as modified hereby, the terms and conditions of said Declaration of Trust shall be and they hereby are re-affirmed, ratified and approved. [56]

This agreement shall be executed by the parties hereto, and immediately upon the appointment of a Trustee in Bankruptcy for said Bankrupt, and his due qualification, and upon the Bankruptcy Court approving this agreement, and authorizing him to execute the same as such Trustee, he shall sign and deliver to the Bank an executed copy thereof, and thereupon he shall, as such Trustee, be bound by the terms and conditions thereof.

This Agreement, in so far as the Receiver in

Exhibit "A"—(Continued)

Bankruptcy is concerned, is subject to the approval of the Bankruptcy Court.

In Witness Whereof, the parties hereto have hereunto set their hands and seals the day and year first hereinabove written.

[Seal] F. P. NEWPORT CORPORATION,
LTD.,

By F. P. NEWPORT, President

By J. B. GRIBBLE, Secretary

H. F. METCALF,

As Receiver for F. P. Newport Corporation, an Alleged Bankrupt

[Seal] SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES

By J. E. HATCH, Vice-President

By RANDALL BOYD, Asst. Secretary

Exhibit "A"

PARCELS AND RELEASE PRICES THEREON REFERRED
TO IN THE FOREGOING AGREEMENT

Parcel No. 1—Lots 204-205 Tract No. 250—

Release Price\$ 65,000.00

Parcel No. 2—Lot 3 Verdugo Estates, Plus portions of
Tract 7146 and Blocks 25 and 26, Selvas de Verdugo—Release Price

45,000.00

Parcel No. 3—Remaining portion of Tract 250, plus
Block 22 of Selvas de Verdugo—Release Price.....

40,000.00

Parcel No. 4—All of the remaining subdivided lots in
the Verdugo area, together with Block 23 and 24
Selvas de Verdugo and the portion of the Theodore Verdugo Allotment—Release Price.....

130,000.00

Parcel No. 5—San Fernando Ranch Property—Lot 24,
Tract 1,000—Release Price

36,500.00

Exhibit "A"—(Continued)

Parcel No. 6—Lot 23, Tract 1,000—Release Price.....	32,500.00
Parcel No. 7—Lot 2, Tract 1,000 and Lots 1 and 2, Tract 1335—Release Price	55,000.00
Parcel No. 8—Lots 4 and 5, Tract 1336—Release Price	45,000.00
Parcel No. 9—Lots 6 and 7, Tract 1336—Release Price	45,000.00
Parcel No. 10—Following Miscellaneous Properties:	
One Release Price	15,000.00
A. Unsold Lots in La Cresenta Oaks.	
B. Unsold parcels in Richland Farms.	
C. Two houses, at 118 Windsor Road and 2866 Canada Blvd., both in Glendale.	

J. E. HATCH R.B.

F. P. NEWPORT,

J. B. GRIBBLE

[58]

SUPPLEMENTAL AGREEMENT

This Agreement, made and entered into this 31st day of August, 1937, by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bankrupt, H. F. Metcalf, as Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a Bankrupt, and Security-First National Bank of Los Angeles, a National Banking Association, with its principal place of business in the City of Los Angeles, State of California, hereinafter called the Bank,

Witnesseth:

Recitals:

Under date of January 12, 1937, the Bankrupt, the Bank, and the then Receiver in Bankruptcy, H. F. Metcalf, entered into an agreement, providing

Exhibit "A"—(Continued)

certain terms and conditions under which the properties of the Bankrupt, held by the Bank, as security for the indebtedness of the Bankrupt, might be sold, and providing therein for the reduction in amount of the Bank's indebtedness, and other matters. Reference is hereby made to said agreement for the complete terms and conditions thereof.

The said Trustee in Bankruptcy, upon his appointment, petitioned the Bankruptcy Court to approve the contract and to authorize the same to be signed by him. [59]

The said Bankruptcy Court has approved said contract, and authorized said Trustee to execute the same, conditioned upon certain modifications, hereinafter set forth, being made thereto. All the parties are willing to modify said contract in said particulars, hence this Agreement.

No interest on the sum of \$1,270,451.12, agreed to be accepted by the Bank under the Contract of January 12, 1937, has been paid since February 1, 1937. The Bank has advanced, since said date, to-wit: on the 16th day of April, 1937, the sum of \$9,120.06 for taxes on the property held by it in said Trust No. D7224, as security for its indebtedness.

The Agreement:

Interest to be added to principal up to August 1st.

It is agreed that interest on said principal sum of \$1,270,451.12, as provided in said agreement, up to August 1, 1937, together with the sum of \$9,-

Exhibit "A"—(Continued)

120.06 advanced for taxes on April 16, 1937, with interest thereon at 4% per annum from the date of such advance, to August 1, 1937, shall be added to the said sum of \$1,270,451.12, and thereafter bear the same interest as said sum. It is agreed that the said sum, augmented by said above mentioned amounts, is as of August 1, 1937, the sum of \$1,-304,918.77. Said sum shall bear interest at the rate of 4% per annum from August 1, 1937, payable as follows: [60]

Interest payment extended.

The first installment of said interest thereon shall be paid on or before March 7, 1938. Thereafter said interest shall be paid quarterly from March 7, 1938. If any installment of interest be not so paid, it shall bear like interest as the principal.

Principal payments extended.

The principal of the Bank's indebtedness, in the agreed amount of \$1,304,918.77, shall be payable on the dates hereinafter specified, instead of on the dates specified in the said contract of January 12, 1937, and shall be paid as follows:

1. \$35,000.00 on or before March 7, 1938.
2. \$65,000.00 on or before September 7, 1938.
3. \$250,000.00 on or before September 7, 1939.
4. \$150,000.00 on or before March 7, 1940.
5. The balance of all indebtedness on or before September 7, 1940.

Repayment of taxes from special fund.

Such additional sums of money as the Bank, at its election, may advance after August 1, 1937, to

Exhibit "A"—(Continued)

pay taxes, assessments and improvement bonds against the property held by it in said Trust D7224, as security for said indebtedness, as provided in said Declaration of Trust, together with interest thereon from the date of such advance, at the rate of 4% per annum, compounded quarterly, shall be repaid to the Bank out of any money held by it in the "Special Fund" provided such fund shall have in it at all times sufficient money to assure the [61] payment of the installment of interest falling due on March 7, 1938.

Provided the other parties hereto shall have complied with all of the other terms and conditions of said Declaration of Trust D7224, and the said Agreement of January 12, 1937, as modified by this Agreement, the Bank agrees that the failure of the Bankrupt or the Trustee in Bankruptcy to pay the installment of taxes for the fiscal year 1937-38, falling due in December of 1937, on the properties held by the Bank in said Trust D7224, or should the Bank advance the money to pay such taxes, the failure to repay the same out of the "Special Fund" shall not constitute such default as to warrant immediate foreclosure of the said Declaration of Trust, and the failure to pay, or to repay the Bank, if the Bank shall advance them, the January installment of principal and interest on Improvement Bonds, a lien against any of the property held by the Bank in said Trust D7224, shall not constitute such default as to warrant immediate foreclosure of said Declaration of Trust. And the Bankrupt, or the

Exhibit "A"—(Continued)

Trustee in Bankruptcy, shall not be called upon to pay said Tax and bond liens, or to repay the same to the Bank should it advance them, with interest as hereinabove provided, prior to the seventh day of March, 1938.

Receipts from Sales and Rentals to pass through hands of Trustee in Bankruptcy.

While the said Declaration of Trust No. 7224, and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property [62] in said Trust, shall be paid to and be received by the Bank, it is, nevertheless, agreed, pursuant to the Order of said Bankruptcy Court, that such payments shall pass through the hands of the Trustee in Bankruptcy, and be paid to said Trustee in Bankruptcy, and shall be by him forthwith paid over in full to the Bank to be distributed in accordance with the terms of the said Trust No. D7224, and the agreement of January 12, 1937, as modified hereby.

It is expressly understood and agreed that any such funds so passing through the hands of the Trustee in Bankruptcy, except as hereinafter provided, shall, while in his possession, be impressed by the lien of the Declaration of Trust securing the indebtedness owing to the Bank. Such funds shall be deposited by the Trustee in Bankruptcy in a separate fund, and not commingled with any other funds in the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness, and, except as in said agreement of January

Exhibit "A"—(Continued)

12, 1937, provided, shall not become any part of the general assets of the Bankrupt Estate, nor charged with the payment of any of the expenses of administering said Bankrupt Estate, and nothing herein contained shall prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee.

No Modification of \$7,000 Income Provision.

Nothing herein contained, however, shall modify or change the provisions of said contract of January 12, 1937, under the heading of temporary [63] collection of rents by the Trustee in Bankruptcy, by the terms of which certain rentals up to a maximum of \$7,000.00 for a limited period, are to be retained by the Trustee in Bankruptcy.

As provided for in said Agreement of January 12, 1937, it is agreed that all sales or leases of property shall be made by the Bank and the Trustee in Bankruptcy, subject to the approval of the Bankruptcy Court.

Referring to the second paragraph, on page seven of said Agreement of January 12, 1937, entitled "Release Prices Credited Only on Principal", it is understood and agreed that the Trustee in Bankruptcy shall not be required, except by an order of this court, to make any payments to the Bank out of funds derived from properties not held by the Bank under its said Trust.

Other than as expressly modified by the terms of this Agreement, the said Agreement of January 12,

Exhibit "A"—(Continued)

1937, shall remain in full force and effect, and is hereby ratified and confirmed.

Contract as Modified Affirmed.

Hubert F. Laugharn was appointed Trustee in Bankruptcy by the Referee in Bankruptcy, and the District Judge made an order vacating said appointment, and adjudging that H. F. Metcalf had been elected Trustee, from which latter order an appeal to the United States Circuit Court of Appeals for the Ninth Circuit is now pending. Said Hubert F. Laugharn petitioned the Court for instructions as to whether or not he should sign the said contract and be bound thereby in the event of [64] a decision confirming his appointment as Trustee and reversing the order of the District Judge, and the Court has instructed him to so sign and be so bound.

Therefore, said Hubert F. Laugharn, by his signing this agreement, becomes bound by all of the terms and conditions thereof, should he become Trustee of said Bankrupt Estate.

This contract shall be binding upon the parties hereto, their successors and assigns.

In Witness Whereof, the parties hereto have hereunto set their hands and seals, the day and year first hereinabove written.

[Seal] F. P. NEWPORT CORPORATION,
LTD.,

Exhibit "A"—(Continued)

By F. P. NEWPORT, President

By J. B. GRIBBLE, Secretary

H. F. METCALF,

Trustee in Bankruptcy for the Creditors of F. P.
Newport Corporation, Ltd., a corporation, Bank-
rupt.

[Seal] SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,

RTA By V. O. WROOLIE, Vice-President

By RANDALL BOYD, Asst. Secretary

HUBERT F. LAUGHARN [65]

EXHIBIT "B"

[Title of District Court and Cause.]

STIPULATION RE MODIFICATION OF CON-
TRACT OR AGREEMENT OF JANUARY
12, 1937

It Is Hereby Stipulated and Agreed by and be-
tween the undersigned that that certain contract or
agreement dated the 12th day of January, 1937,
made and entered into by and between F. P. New-
port Corporation, Ltd., a Delaware corporation,
bankrupt, H. F. Metcalf as Receiver for said F. P.
Newport Corporation, Ltd., and Security-First Na-
tional Bank of Los Angeles, a national banking
association, (copy of which contract or agreement is
attached to, marked Exhibit "A", and made part
of the Findings and Order made and signed by the

Exhibit "B"—(Continued)

Honorable Ernest R. Utley, Referee in Bankruptcy herein, on the 13th day of August, 1937) may be and is hereby modified in the following respects and particulars only, to wit:

(1) That certain paragraph appearing on page 6 of said contract or agreement (pages 6 and 7 of said Exhibit "A"), reading as follows:

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy, and shall be subject to the approval of the Bankruptcy Court.

Is Hereby Changed, Altered and Modified to Read As Follows: [66]

All properties not described in said Exhibit "A" shall be retained in said Trust and be leased or sold on terms and conditions subject to the approval of the Bankruptcy Court. For the purposes of this agreement it is understood that no release prices are fixed on properties not described in said Exhibit "A".

(2) That certain paragraph appearing on page 6 of said contract or agreement (page 7 of said Exhibit "A") reading as follows:

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to the Bank and the Trustee in Bankruptcy and shall be subject to the approval of the Bankruptcy Court.

Exhibit "B"—(Continued)

Is Hereby Changed, Altered and Modified to Read
As Follows:

Any and all sales of said real property described in Exhibit "A" shall be on terms and conditions satisfactory to and shall be subject to the approval of the Bankruptcy Court.

Dated this 14th day of October, 1937.

[Seal] F. P. NEWPORT CORPORATION,
LTD.,

By F. P. NEWPORT, President

By J. B. GRIBBLE, Secretary [67]

[Seal] SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,

By C. W. CRAIG, Vice President

By RANDALL BOYD, Asst. Secretary
H. F. METCALF,

As Trustee in Bankruptcy of F. P. Newport Corporation, Ltd. (H. F. Metcalf)

HUBERT F. LAUGHARN,
L. M. CAHILL,

Counsel for F. P. Newport Corporation, Ltd.

W. C. SHELTON,
GEORGE BURCH, JR., and
EARL E. MOSS,

By W. C. SHELTON,

Counsel for said Security-First National Bank of Los Angeles

ROBERT B. POWELL,

Counsel for Hubert F. Laugharn

Exhibit "B"—(Continued)

BAILIE, TURNER & LAKE,
By NORMAN A. BAILIE,
Counsel for H. F. Metcalf, Trustee

Approved this 14th day of October, 1937.

PAUL J. McCORMICK,
United States District Judge

EXHIBIT "C"

[Title of District Court and Cause.]

STIPULATION RE MODIFICATION OF SUP-
PLEMENTAL AGREEMENT DATED AU-
GUST 31, 1937

It Is Hereby Stipulated and Agreed by and between the undersigned that that certain "Supplemental Agreement" dated the 31st day of August, 1937, and made and entered into by and between F. P. Newport Corporation, Ltd., a Delaware Corporation, Bankrupt, H. F. Metcalf, as Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., a Bankrupt, and Security-First National Bank of Los Angeles, a National Banking Association, (copy of which "Supplemental Agreement" is attached to, marked Exhibit "C" and made a part of the Findings and Order made and signed by the Honorable Ernest R. Utley, Referee in Bankruptcy herein, on the 13th day of August, 1937), may be and is hereby modified in the following respects and particulars only, to wit:

Exhibit "C"—(Continued)

Those certain paragraphs appearing on pages 3 and 4 of said "Supplemental Agreement" and reading as follows: [69]

"While the said Declaration of Trust No. 7224, and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust, shall be paid to and be received by the Bank, it is, nevertheless, agreed, pursuant to the Order of said Bankruptcy Court, that such payments shall pass through the hands of the Trustee in Bankruptcy, and be paid to said Trustee in Bankruptcy, and shall be by him forthwith paid over in full to the Bank to be distributed in accordance with the terms of the said Trust No. D7224, and the agreement of January 12, 1937, as modified hereby.

"It is expressly understood and agreed that any such funds so passing through the hands of the Trustee in Bankruptcy, except as hereinafter provided, shall, while in his possession, be impressed by the lien of the Declaration of Trust securing the indebtedness owing to the Bank. Such funds shall be deposited by the Trustee in Bankruptcy in a separate fund, and not commingled with any other funds in the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness, and, except as in said agreement of January 12, 1937, provided, shall not become any part of the general assets of the Bankrupt Estate, nor charged with the payment of any of the expenses of administering said Bankrupt Estate, and

Exhibit "C"—(Continued)

nothing herein contained shall [70] prevent the Court from fixing fees on the basis of all money passing through the hands of the Trustee."

Are Hereby Changed, Altered and Modified to Read as Follows:

"While the said Declaration of Trust No. D7224 and the contract of January 12, 1937, provide expressly that all moneys from Sales and Leases of Property in said Trust shall be paid to and be received by the Bank, it is, nevertheless, agreed, in order to comply with the bankruptcy law requiring that all bankruptcy funds be accounted for by the Trustee and be disbursed by him only upon checks or warrants countersigned by the Referee, that all such moneys shall be paid to said Trustee in Bankruptcy, and, until the indebtedness due the Bank has been paid, shall be by him forthwith paid over in full to the Bank, to be distributed in accordance with the terms of said Trust No. D7224 and the agreement of January 12, 1937, as modified hereby.

"Recognizing that the Bank has a prior right to the moneys in the preceding paragraph mentioned until the indebtedness due it has been paid, it is therefore expressly understood and agreed that such funds or moneys so paid to and received by the said Trustee in Bankruptcy from Sales or Leases or other disposition of property under said Trust shall, until the indebtedness due the Bank has been paid and [71] except as hereinafter provided, be, while in his possession, impressed with the lien of the Declaration of Trust securing the indebtedness ow-

Exhibit "C"—(Continued)

ing to the Bank, and such funds or moneys shall be deposited by the Trustee in Bankruptcy in a separate bank account and not commingled with any other funds of the Bankrupt Estate, and shall be deemed earmarked for application on the Bank's indebtedness as provided in said agreement of January 12, 1937, and this supplement thereto, and except as in said agreement and said supplement provided, shall not, until the indebtedness due the Bank has been paid, become any part of the general assets of the Bankrupt Estate. No provision of said agreement of January 12, 1937, or this supplement thereto is made or entered into, directly or indirectly, for the purpose of fixing the amount of the fees or other compensation to be paid to any party in interest or any attorneys of any party in interest in this bankruptcy proceeding, for services rendered in connection therewith or otherwise, and the fixing and determination of any fees or compensation to be paid to anyone whomsoever from the assets of this Bankrupt Estate, is, in accordance with the law, left entirely to the determination of the court having jurisdiction of this bankruptcy proceeding, unaffected by any provision, term or condition, express or implied, of said contract of January 12, 1937, or of this supplement thereto."

Dated this day of October, 1937.

[Seal] **F. P. NEWPORT CORPORATION,
LTD.,**

By **F. P. NEWPORT**, President

By **J. B. GRIBBLE**, Secretary

Exhibit "C"—(Continued)

[Seal] SECURITY-FIRST NATIONAL
BANK OF LOS ANGELES,

By L. W. CRAIG, Vice President

By R. T. ADAMS, Asst. Secretary

H. F. METCALF,

As Trustee in Bankruptcy of F. P.

Newport Corporation, Ltd.

HUBERT F. LAUGHARN,

L. M. CAHILL,

Counsel for F. P. Newport Corpora-
tion, Ltd.

W. C. SHELTON, GEORGE BURCH,
JR., and EARL E. MOSS,

By W. C. SHELTON,

Counsel for Security-First National

Bank of Los Angeles [73]

ROBERT B. POWELL,

Counsel for Hubert F. Laugharn

BAILIE, TURNER & LAKE,

By NORMAN A. BAILIE,

Counsel for H. F. Metcalf, Trustee
in Bankruptcy

Approved this 29th day of October, 1937.

PAUL J. McCORMICK,

United States District Judge

[Endorsed]: Filed Dec. 31, 1940, Ernest R. Uteley,
Referee. Filed Nov. 28, 1941. R. S. Zimmerman,
Clerk. [74]

[Title of District Court and Cause.]

SUPPLEMENTAL CERTIFICATE ON
REVIEW

On June 2, 1954 the undersigned Referee in Bankruptcy, on behalf of Hugh L. Dickson, a Referee in Bankruptcy of this Court, filed herein a certificate on review of Referee Dickson's order entered March 24, 1954, disallowing the claim of the United States of America for income taxes in the sum of \$11,970.13. At the request of counsel for the Federal government, this supplemental certificate is accompanied with a copy of a stipulation of facts entered into between the Trustee in Bankruptcy of the estate and the United States of America and Nat Rogan, its Collector of Internal Revenue, dated Dec. 30, 1940, and which appears on pages 50 to 60, both pages inclusive, in the transcript of record of the Supreme Court of the United States, October term 1942, No. 665 in the case of H. F. Metcalf, as Trustee in Bankruptcy of the Estate of F. P. Newport Corporation, Ltd., a corporation, Bankrupt, Petitioner, vs. United States of America, Respondent. It is stipulated by the parties to the review that [75] such printed stipulation of facts is a true copy of the original.

On March 18, 1954, during the argument of the matter before Referee Dickson, Mr. Harpole on behalf of the United States of America stated: "For the purpose of the record I wish to have the stipulation of facts filed in the original objection to

the government's claim considered as part of the evidence in connection with this objection," to which Referee Dickson replied: "That will be done."

Dated: June 24, 1954.

/s/ REUBEN G. HUNT,

Referee in Bankruptcy [76]

[Endorsed]: Filed June 24, 1954.

[Title of District Court and Cause.]

ORDER ON PETITION TO REVIEW REFER-
EE'S ORDER DISALLOWING CLAIM FOR
INCOME TAXES DATED MARCH 24, 1954

The petition of the United States of America to review the Order of the Referee dated March 24, 1954, disallowing the claim of the United States for income taxes in the sum of \$11,970.13, heretofore argued and submitted, is hereby decided as follows:

The said Order of the Referee is hereby affirmed.
Formal Order to follow.

The only question before the Court is whether the Referee was justified in disallowing the claim for taxes on income derived after liquidation. The Court is of the view that from the moment of liquidation, the Trustee was no longer operating the business. See writer's opinion in *Re Owl Drug Company*, D.C. Cal., 1937, 21 Fed. Supp. 907; California State

Board of Equalization vs. Goggin, 1951, 9 Cir., 191 F.(2) 726, 728.

Hence the ruling above made.

Dated: July 6, 1954.

/s/ LEON R. YANKWICH,

Chief Judge

[77]

[Endorsed]: Filed July 6, 1954.

In the United States District Court, Southern District of California, Central Division

No. 25,308—Bankruptcy

In the Matter of F. P. NEWPORT CORPORATION, LTD., a corporation, Bankrupt.

**ORDER AFFIRMING REFEREE'S ORDER
DATED MARCH 24, 1954, DENYING CLAIM
OF UNITED STATES FOR 1952 INCOME
TAXES**

Petition of the United States of America to review the order of the Referee in Bankruptcy dated March 24, 1954, disallowing the claim of the United States for Income taxes for the calendar year 1952 in the sum of \$11,970.13 came on for argument before this Court on June 28, 1954, Eugene M. Harpole, Esq., appearing for the United States, and George Bouchard, Esq., appearing for the trustee, the Court having heard the arguments of counsel

and being fully advised in the premises, now makes its Order as follows:

The Order of the Referee, dated March 24, 1954, disallowing the claim of United States for income tax for the calendar year 1952 in the sum of \$11,-970.13 is hereby confirmed.

Dated: July 15, 1954.

/s/ LEON R. YANKWICH,

Chief Judge, U. S. District Court

Approved as to form: Signed Laughlin E. Waters,
U. S. Attorney; Edward R. McHale, Asst. U. S.
Attorney; Eugene Harpole, Special Attorney,
Attorneys for United States. [78]

[Endorsed]: Filed July 15, 1954.

[Endorsed]: Judgment Docketed and Entered
July 16, 1954.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, a claimant in the above entitled bankruptcy proceeding, that it hereby appeals to the Court of Appeals for the Ninth Circuit from the Orders of the United States District Court for the Southern District of California, confirming and approving the Order of Hugh L. Dickson, Referee in Bankruptcy, of March 24, 1954, disallowing in full

the claim theretofore filed in the above entitled proceeding on behalf of the United States of America for income taxes alleged to be due from the bankrupt estate for the taxable year 1952, made and entered in this action through the Honorable Leon R. Yankwich, Judge of the above entitled Court on the 6th day of July, 1954, and the 15th day of July, 1954.

Dated: This 3rd day of August, 1954.

LAUGHLIN E. WATERS,
United States Attorney

EDWARD R. McHALE,
Asst. U. S. Attorney, Chief, Tax
Division

EUGENE HARPOLE,
Special Attorney, Internal Revenue
Service

/s/ By EUGENE HARPOLE,
Attorneys for Claimant, United
States of America [79]

[Endorsed]: Filed August 3, 1954.

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS TO
BE URGED UPON APPEAL

To: Paul W. Sampsell, The Trustee in Bankruptcy herein, and Bailie, Turner, Lake & Sprague and George Bouchard, his attorneys; Bank of America, National Trust & Savings Association and Edmund Nelson its attorney; Respondent Colter and William H. Neblett his attorney, and D. Day, et al., and Lawrence M. Cahill their attorney:

You and Each of You Will Please Take Notice that under the provisions of Rule 75 of the Rules of Civil Procedure of the District Courts of the United States, the Appellant intends to rely upon the following points in the appeal of the above entitled case:

1. That the District Court and the Referee in Bankruptcy erred in disallowing the claim filed by Robert A. Riddell as Director of Internal Revenue for the Los Angeles District of California on behalf of the United States of America for Federal income taxes for the taxable year 1952 in the sum of \$11,-391.21 for the reason that said taxes were lawfully due to the United States upon the net income realized by the bankrupt estate from the operation of its property or business during said year.

2. That the District Court and the Referee in Bankruptcy erred in [80] failing and refusing to hold that the Trustee in Bankruptcy was, during the taxable year 1952, operating the property or

business of F. P. Newport Corporation, Ltd., the bankrupt herein, within the meaning of §52(a) of the Internal Revenue Code and §39.52-2 of the Federal Tax Regulations (1954 Edition Congressional Code Service).

3. That the District Court and the Referee in Bankruptcy erred in holding that the net income of \$32,483.09 determined by the Commissioner of Internal Revenue to have been received by said bankrupt estate and its Trustee in Bankruptcy during the calendar year 1952 was not subject to Federal income taxes within the meaning of §52(a) of the Internal Revenue Code.

4. That the District Court and the Referee in Bankruptcy erred in failing to allow the claim filed on behalf of the United States of America for 1952 income taxes in the sum of \$11,391.21.

Dated: This 6th day of October, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

EUGENE HARPOLE,

Special Attorney, Internal Revenue
Service

/s/ By EUGENE HARPOLE,

Attorneys for United States of
America

[81]

Affidavit of Service by Mail attached.

[82]

[Endorsed]: Filed October 14, 1954.

[Title of District Court and Cause.]

CLAIMANT-APPELLANT'S DESIGNATION
OF RECORD

To: The Clerk of the District Court of the United States for the Southern District of California, Central Division:

You Are Hereby Requested to include in the record on appeal herein from the Orders of the District Court signed and filed July 6, 1954 and July 15, 1954, confirming and approving the Order of the Referee in Bankruptcy, Hugh L. Dickson, of March 24, 1954, which disallowed the claim of the United States for 1952 income taxes, the following:

1. Petition in Bankruptcy.
2. Order of Adjudication.
3. Order appointing Paul W. Sampsell trustee in bankruptcy.
4. Claim filed by Collector of Internal Revenue for deficiency in 1952 Federal income taxes on or about the 6th day of January, 1954.
5. Trustee's Objection to allowance of the claim for Federal income taxes for 1952.
6. The Referee's Order of March 24, 1954, disallowing the claim of the Collector of Internal Revenue for 1952 Federal income taxes.
7. Motion and Order Extending Time to File Petition for Review. [83]

8. Petition for Review of the Referee's Order of March 24, 1954, filed May 12, 1954.

9. Referee's Certificate on Review filed June 2, 1954.

10. Supplemental Certificate on Review dated June 24, 1954.

11. Stipulation of Facts dated March 18, 1954.

12. Stipulation of Facts between counsel H. F. Metcalf (the then Trustee in Bankruptcy) and the United States dated December 30, 1940, and its exhibits filed herein.

13. Orders of the District Court dated July 6, 1954, and July 15, 1954 (the Orders appealed from) approving and affirming the Referee's Order Disallowing the Claim filed for 1952 Federal Income Taxes.

14. Notice of Appeal.

15. All Orders Extending Time to Docket Cause on Appeal.

16. This Designation of Record on Appeal.

17. Designation of Points to be Relied Upon on Appeal.

18. Clerk's Certificate.

This transcript is to be prepared as required by law and the rules of this Court and the rules of the Court of Appeals of the United States for the Ninth Circuit at San Francisco, California.

Dated: This 6 day of October, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax
Division

EUGENE HARPOLE,

Special Attorney, Internal Revenue
Service

/s/ By EUGENE HARPOLE [84]

Affidavit of Service by Mail attached. [85]

[Endorsed]: Filed October 14, 1954.

[Title of District Court and Cause.]

TRUSTEE-APPELLEE'S DESIGNATION
OF RECORD

To: The Clerk of the District Court of the United
States for the Southern District of California,
Central Division:

You Are Hereby Requested to include in the record on appeal from the Orders of the District Court signed and filed July 6, 1954, and July 15, 1954, confirming and approving the Order of the Referee in Bankruptcy dated March 24, 1954, which disallowed the claim of the United States for 1952 income taxes the following additional portion of the record, proceedings and evidence:

1. Petition for Order of Liquidation dated April 14, 1952.

2. Order of Liquidation signed by the Honorable Hugh L. Dickson, Referee in Bankruptcy, dated May 26, 1952.

3. Petition for Review filed June 5, 1952.

4. Order of the District Judge Confirming Referee's Order of Liquidation signed by the Honorable Paul J. McCormick, United States District Judge, dated November 28, 1952, and docketed and entered December 1, 1952.

Dated: 18th day of October, 1954.

NORMAN A. BAILIE,
GEORGE BOUCHARD,

/s/ By GEORGE BOUCHARD,

Attorneys for Trustee in Bankruptcy

[Endorsed]: Filed October 19, 1954. [86]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
CAUSE ON APPEAL

Upon motion of Claimant-Appellant, United States of America, and good cause appearing therefor:

It Is Hereby Ordered that the time within which to file the record and docket the appeal in the United States Court of Appeals for the Ninth Cir-

cuit be, and the same is hereby, extended to and including the 1st day of November, 1954.

Dated: This 3rd day of September, 1954.

/s/ BEN HARRISON,
United States District Judge

Presented by:

/s/ EDWARD R. McHALE,
Assistant United States Attorney, Chief,
Tax Division. [87]

Affidavit of Service by Mail attached. [88]

[Endorsed]: Filed September 3, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 88, inclusive, contain the original Claim of United States for Taxes; Objections to Claim of United States Government for Taxes alleged to be due; Stipulation of Facts filed March 24, 1954; Order Disallowing Claim of Director of Internal Revenue for 1952 Income Taxes; Two Motions and Orders Extending Time to File Petition for Review; Petition for Review; Certificate of Referee on Review; Copy of Stipulation of Facts filed December 31, 1940; Supplemental Certificate on Review; Order on Petition to Review Re-

feree's Order Disallowing Claim for Income Taxes dated March 24, 1954; Order Affirming Referee's Order dated March 24, 1954, denying Claim of United States for 1952 Income Taxes; Notice of Appeal; Statement of Points to be Urged Upon Appeal; Two Designations of Record on Appeal and Order Extending Time to Docket Appeal which, together with Petition in Bankruptcy (pp. 2-5); Order of Adjudication (p. 6); Order Approving Appointment of Paul W. Sampsell as Trustee in Bankruptcy (p. 7); Petition for Order of Liquidation dated April 14, 1952 (pp. 86-101); Order of Liquidation signed by Referee in Bankruptcy, dated May 26, 1952 (pp. 104-105); Petition for Review filed June 5, 1952 (pp. 106-115) and Order of District Judge Confirming Referee's Order of Liquidation (p. 116), certified as part of the record on the appeal of F. P. Newport Corporation, Ltd., shortly to be certified to the United States Court of Appeals for the Ninth Circuit, in this same cause, constitute the transcript of record on this appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 28 day of October, A. D. 1954.

[Seal]

EDMUND L. SMITH,

Clerk

/s/ By THEODORE HOCKE,

Chief Deputy

[Endorsed]: No. 14569. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Paul W. Sampsell, Trustee in Bankruptcy for the Estate of F. P. Newport Corporation, Ltd., bankrupt, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: October 29, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14569

UNITED STATES OF AMERICA,
Appellant,
vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy
of the Estate of F. P. Newport Corporation,
Ltd., a Corporation, Bankrupt, Appellee.

APPELLANT'S STATEMENT OF POINTS

To: Paul W. Sampsell, The Trustee in Bankruptcy
herein, and Bailie, Turner, Lake & Sprague
and George Bouchard, his attorneys; Bank of
America, National Trust & Savings Association
and Edmund Nelson its attorney; Respondent
Colter and William H. Neblett his attorney,
and D. Day, et al., and Lawrence M. Cahill
their attorney:

You, and Each of You Will Please Take Notice
That: Under the provisions of subsection (6) of
Rule 19, the Rules of Practice of the United States
Court of Appeals for the Ninth Circuit, that the
Appellant, United States of America, intends to
rely upon the following points in its appeal from
the orders of the District Court of July 6 and 15,
1954, which confirmed and approved the Order of
the Referee in Bankruptcy of March 24, 1954, dis-
allowing the claim of the United States for 1952
income taxes:

1. That the District Court and the Referee in Bankruptcy erred in disallowing the claim filed by Robert A. Riddell as Director of Internal Revenue for the Los Angeles District of California on behalf of the United States of America for Federal income taxes for the taxable year 1952 in the sum of \$11,391.21 for the reason that said taxes were lawfully due to the United States upon the net income realized by the bankrupt estate from the operation of its property or business during said year.

2. That the District Court and the Referee in Bankruptcy erred in failing and refusing to hold that the Trustee in Bankruptcy was, during the taxable year 1952, operating the property or business of F. P. Newport Corporation, Ltd., the bankrupt herein, within the meaning of §52(a) of the Internal Revenue Code and §39.52-2 of the Federal Tax Regulations (1954 Edition Congressional Code Service).

3. That the District Court and the Referee in Bankruptcy erred in holding that the net income of \$32,483.09 determined by the Commissioner of Internal Revenue to have been received by said bankrupt estate and its Trustee in Bankruptcy during the calendar year 1952 was not subject to Federal income taxes within the meaning of §52(a) of the Internal Revenue Code.

4. That the District Court and the Referee in Bankruptcy erred in failing to allow the claim filed

on behalf of the United States of America for 1952
income taxes in the sum of \$11,391.21.

Dated: This 26th day of October, 1954.

LAUGHLIN E. WATERS,

United States Attorney

EDWARD R. McHALE,

Asst. U. S. Attorney, Chief, Tax

Division

EUGENE HARPOLE,

Special Attorney, Internal Revenue

Service

/s/ By EUGENE HARPOLE,

Attorneys for Appellant-Claimant, United States of
America.

Affidavit of Service by Mail attached.

[Endorsed]: Filed Oct. 29, 1954. Paul P. O'Brien,
Clerk.

No. 14569.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the
Estate of F. P. Newport Corporation, Ltd., Bankrupt,

Appellee.

On Appeal from the United States District Court
for the Southern District of California.

BRIEF FOR THE UNITED STATES.

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
GRANT W. WIPRUD,
*Special Assistants to the
Attorney General.*

LAUGHLIN E. WATERS,
United States Attorney,
EDWARD R. McHALE,
Assistant United States Attorney.

600 Federal Building,
Los Angeles 12, California,

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No. 14569.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the
Estate of F. P. Newport Corporation, Ltd., Bankrupt,

Appellee.

On Appeal from the United States District Court
for the Southern District of California.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The District Court did not file an opinion herein. Its grounds for entering the order appealed from are indicated briefly in a preliminary order filed on July 6, 1954. [R. 112-113.]

Jurisdiction.

F. P. Newport Corporation, Ltd., was adjudicated a bankrupt by an order of the District Court for the Southern District of California entered on January 12, 1937

[R. 6-7], acting under authority of Section 2 of the Bankruptcy Act, c. 541, 30 Stat. 544, as amended.¹ On November 20, 1950, Paul W. Sampsell was appointed and is now acting trustee of the bankrupt estate of F. P. Newport Corporation, Ltd. [R. 7-8.] The present appeal involves a claim of the United States, filed with the trustee in bankruptcy on January 7, 1954 [R. 41-43], for federal income taxes assessed against the trustee in bankruptcy for the year 1952 in the amount of \$11,391.21, the Government's claim therefor having been successively disallowed below by the referee in bankruptcy [R. 58-59] and by the District Court. [R. 113-114.] (The figure used by the District Court, \$11,970.13 [R. 113], includes interest to January 20, 1954. [R. 42.]) The order of the District Court affirming the referee's disallowance of the claim of the United States was entered July 15, 1954. [R. 113-114.] Notice of appeal therefrom was filed by the United States on August 3, 1954. [R. 114-115.] Jurisdiction was conferred on the District Court by Section 2 of the Bankruptcy Act, as amended, and by Section 24, Nineteenth, of the Judicial Code, as amended, now 28 U. S. C., Section 1334. Jurisdiction to hear this appeal is conferred on this Court by 28 U. S. C., Section 1291.

¹See, also, *In re F. P. Newport Corp.*, 93 F. 2d 630; 97 F. 2d 504; 98 F. 2d 453 (C. A. 9th), cert. den. *sub nom. McAdoo & Neblett v. F. P. Newport Corp.*, 305 U. S. 660; *City of Long Beach v. Metcalf*, 103 F. 2d 483 (C. A. 9th), cert. den., 308 U. S. 602; *Security-First Nat. Bank v. Bank of America, etc., Ass'n*, 111 F. 2d 50 (C. A. 9th); *United States v. Metcalf*, 131 F. 2d 677 (C. A. 9th), cert. den., 318 U. S. 769; *Security-First Nat. Bank v. United States*, 153 F. 2d 563 (C. A. 9th); *United States v. Metcalf*, 154 F. 2d 56 (C. A. 9th).

Question Presented.

Where a trustee in bankruptcy has been held by this Court to be operating the property or business of the bankrupt corporation within the meaning of Section 52(a) of the Internal Revenue Code of 1939, and hence to be liable for income taxes, does the entry thereafter of an order directing the trustee to liquidate and distribute the assets and close the estate relieve him of liability to pay taxes on subsequent income?

Statute and Regulations Involved.

Internal Revenue Code of 1939:

Sec. 52. Corporation Returns.

(a) *Requirement*.—Every corporation subject to taxation under this chapter shall make a return, stating specifically the items of its gross income and the deductions and credits allowed by this chapter and such other information for the purpose of carrying out the provisions of this chapter as the Commissioner with the approval of the Secretary may by regulations prescribe. * * * In cases where receivers, trustees in bankruptcy, or assignees are operating the property or business of corporations, such receivers, trustees, or assignees shall make returns for such corporations in the same manner and form as corporations are required to make returns. Any tax due on the basis of such returns made by receivers, trustees, or assignees shall be collected in the same manner as if collected from the corporations of whose business or property they have custody and control.

* * * * *

(26 U. S. C. 1952 ed., Sec. 52.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.52-2. *Returns by receivers.* Receivers, trustees in dissolution, trustees in bankruptcy, and assignees, operating the property or business of corporations, must make returns of income for such corporations. If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Notwithstanding that the powers and functions of a corporation are suspended and that the property and business are for the time being in the custody of the receiver, trustee, or assignee, subject to the order of the court, such receiver, trustee, or assignee stands in the place of the corporate officers and is required to perform all the duties and assume all the liabilities which would devolve upon the officers of the corporation were they in control. * * * A receiver in charge of only part of the property of a corporation, however, as, for example, a receiver in mortgage foreclosure proceedings involving merely a small portion of its property, need not make a return of income.

Statement.

The undisputed facts material to this appeal, as stipulated below² and as revealed by the pleadings, may be summarized as follows:

F. P. Newport Corporation, Ltd., the bankrupt herein (sometimes referred to hereinafter as Newport), was incorporated in 1929, and thereafter engaged in the real estate business in California, purchasing large tracts of unimproved land, subdividing and improving them, and selling the lots. [R. 70.] On March 19, 1935, the instant bankruptcy proceedings were instituted by the filing of an involuntary petition, and a receiver was appointed by the court. [R. 3-6, 71.] The receivership continued until January 12, 1937, when the corporation was adjudicated a bankrupt. [R. 6-7, 71.] H. F. Metcalf was appointed trustee in bankruptcy on March 18, 1937, and in that capacity assumed possession and control of all the property and assets of the bankrupt. [R. 71.]

At the date of bankruptcy Newport's assets consisted *inter alia* of numerous parcels of real estate, both improved and unimproved; and approximately 90 per cent of this

²There are two stipulations of facts in the record: A stipulation of facts in connection with claim of Director of Internal Revenue for 1952 income taxes, with exhibits, which was filed herein on March 24, 1954 [R. 55-59]; and a stipulation of facts, with exhibits, filed herein with the referee in bankruptcy on December 31, 1940 [R. 69-110]. The former stipulation is incorporated by reference into the certificate on review of referee's order disallowing federal tax claim, filed herein June 2, 1954. [R. 66-69.] The latter stipulation, by supplemental certificate on review, filed June 24, 1954 [R. 111-112], was also before the District Court in its review of the referee's order.

realty stood in the name of the Security-First National Bank of Los Angeles (hereinafter called the bank), as security for an indebtedness from Newport to the bank exceeding \$1,300,000. The bank filed a claim in the bankruptcy proceedings herein as an unsecured creditor in the amount of \$500,000, as being the amount by which Newport's indebtedness to the bank exceeded the value of the security. Other claims filed herein totaled in excess of \$295,000. [R. 71-72.]

As of the date of the bankruptcy adjudication, January 12, 1937, the bank entered into an agreement with Newport and the trustee in bankruptcy for the purpose of avoiding a forced sale of assets, the agreement providing *inter alia* that the bank would not foreclose on the real property held by it as security provided that specified payments on account of the indebtedness were made on specified dates. [R. 72, 79-103.]

Among the real properties title to which was held by the bank were properties adjacent to lands on which successful oil and gas well operations were conducted during the bankruptcy proceedings herein. The bank and the trustee in bankruptcy wished to develop any mineral assets which might underlie the bankrupt's lands; but the trustee did not have sufficient funds to enable him to drill for oil or gas wells. However, with the approval of the court, the trustee leased certain lands to Universal Consolidated Oil Company, and other lands to the Bankline Oil Company (hereinafter referred to as Universal and Bankline, respectively). Subsequent oil and gas well operations by

these lessees were successful, and substantial oil and gas bonuses and royalties were received in 1938 and 1938 by the trustee, who in turn paid them over to the bank under order of the court. [R. 72-74.]

The trustee in bankruptcy also made sales of real estate during 1938 and 1939, paying 80 per cent thereof to the bank under court order and retaining the balance for administration expenses; rented certain of the real properties, mainly for agricultural purposes; and repaired and improved certain of the properties to preserve them from hazards of fire and flood. [R. 74-75.]

Prior to December 31, 1940, there was no court order entered herein authorizing the trustee to conduct the business of the bankrupt or forbidding him to do so; but the court had made orders authorizing the trustee to make leases of agricultural lands, grant easements, rights of way for streets, make sales of real property, cancel leases of real property, make payments upon the indebtedness of the bankrupt, compromise claims against the bankrupt, enter agreements with the City of Long Beach, California, concerning rights to oil and gas produced under the lease to Universal pending determination of title disputes, renew contracts with the Oil Field Testing and Engineering Company, Inc., and lease a barn for the storage of hay. [R. 75-76.]

In *United States v. Metcalf*, 131 F. 2d 677, cert. den., 318 U. S. 769,³ this Court held that the activities of the

³See, also, *United States v. Metcalf*, 154 F. 2d 56 (C. A. 9th).

trustee in bankruptcy herein, in 1938 and 1939, constituted the operation of the bankrupt's property within the meaning of Section 52 of the Internal Revenue Code of 1939, and that the trustee was accordingly liable for federal income taxes on the income received during the years 1938 and 1939. In all subsequent years until 1952 the trustee filed federal income tax returns showing the items of income and deduction during the course of his administration and paying the tax reported thereon. [R. 55-56.]

On November 20, 1950, the court below entered an order approving the appointment of the present trustee in bankruptcy, Paul W. Sampsell. [R. 7-8.] Thereafter, on April 14, 1952, the present trustee filed a petition for order of liquidation, alleging that it was in the best interests of all concerned to sell the assets at public auction and close the estate. [R. 8-13.] This petition was granted by the referee's order of liquidation, filed May 26, 1952, directing the trustee to sell the assets at either private or public auction and to close the estate. [R. 40-41.] This order of liquidation was confirmed by order of the District Court dated November 28, 1952, and entered March 24, 1954. [R. 57-58.]

The trustee filed a federal income tax return for the calendar year 1952, which included only income and expenses of the trustee for the period January 1, 1952, to May 26, 1952. He did not include in the return income and expenses for the period subsequent to May 26, 1952, for the reason that, as he contended, he was no longer operating the property or business of the bankrupt after

the order of liquidation of May 26, 1952, and therefore was not liable for taxes on income received after that date. The trustee attached to his 1952 income tax return a statement to this effect. [R. 56.] The Commissioner of Internal Revenue, however, took the position that the liquidation order of May 26, 1952, did not relieve the trustee from liability for taxes on income received after that date. Accordingly, on January 7, 1954, the Government filed in the proceedings below its claim for taxes, in which it asserted the deficiency in income taxes for 1952 involved in this appeal. [R. 41-43.] The trustee filed objections to this claim on February 5, 1954 [R. 43-49]; and on March 24, 1954, the referee in bankruptcy entered an order disallowing the claim of the Director of Internal Revenue for 1952 income taxes. [R. 58-59.] The Government petitioned for review of this order [R. 62-65], and the order was thereafter reviewed by the court on certificate and supplemental certificate of the referee [R. 66-69, 111-112] and on the two stipulations of fact described in footnote 2, *supra*. [R. 55-57, 69-78.] Thereafter, the court below entered the order here appealed from, *viz.*, the order affirming referee's order dated March 24, 1954, denying claim of the United States for 1952 income taxes. [R. 113-114.]

Much of the property of the corporation which came into the hands of the trustee still remained unsold on March 18, 1954. [R. 57.]

Statement of Points to Be Urged.

1. The mere entry of an order of liquidation on May 26, 1952, could not, of its own force and effect, terminate the operation of the bankrupt's properties by the trustee within the meaning of Section 52(a); and there is no showing whatever that the trustee's activities changed on May 26, 1952, while, to the contrary, there is affirmative evidence that his activities continued unchanged and that substantial assets remained in his hands until 1954.

2. Even were the trustee engaged only in marshaling, selling, and disposing of the assets of the estate after May 26, 1952, he would still be operating the bankrupt's property under Section 52(a) and Treasury Regulations which have acquired the force of law.

Summary of Argument.

This is an appeal from a ruling in bankruptcy proceedings below that, by virtue of entry of an order directing liquidation, the trustee was no longer "operating the property or business" of the bankrupt within the meaning of Section 52(a) of the Internal Revenue Code of 1939. The trustee had been held by this Court, in an appeal proceeding in 1942, to have been "operating the property or business" under Section 52(a) during the tax years 1938 and 1939; and the trustee thereafter reported income and paid taxes thereon until May 26, 1952, when the order of liquidation was entered. The estate of the bankrupt was not in fact liquidated in 1952, the trustee retaining substantial assets as late as 1954. Nevertheless, the

trustee contended, and the District Court ruled, that entry of the liquidation order on May 26, 1952, relieved him from further compliance with Section 52(a).

We submit that the ruling of the District Court is clearly erroneous. Section 52(a) does not in terms exempt a liquidating trustee; and the pertinent Treasury Regulations thereunder (which have the force of law in view of their history) provide that a trustee in full control of the bankrupt's estate shall be deemed to be operating the business or property whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. Furthermore, the great weight of relevant decisions supports the proposition that a liquidating trustee in bankruptcy must comply with Section 52(a). The two decisions cited to the contrary by the District Court are clearly distinguishable.

Therefore, even were there evidence that the trustee's activities changed on May 26, 1952, and that after that date he was engaged solely in liquidating the assets of the bankrupt, it would still follow that he was subject to Section 52(a). But there is no such evidence of record here. To the contrary, there is evidence which indicates that the trustee's activities continued unchanged.

Under these circumstances, the mere entry of an order of liquidation could not of itself avert the application of Section 52(a); and the order of the District Court to the contrary should be reversed.

ARGUMENT.

The District Court Erred in Ruling That an Order of Liquidation in Bankruptcy Proceedings Relieves the Trustee of Further Liability for Federal Income Taxes.

The question presented by this appeal is whether a trustee in bankruptcy was "operating the property or business" of the bankrupt, within the meaning of Section 52(a) of the Internal Revenue Code of 1939, *supra*, throughout the tax year 1952. The same question, with respect to prior tax years, was before this Court in these same proceedings in *United States v. Metcalf*, 131 F. 2d 677, cert. den., 318 U. S. 769; and it was held that the activities of the trustee in 1938 and 1939 constituted the operation of the bankrupt's property within the meaning of Section 52(a) and hence that the trustee was liable for taxes on the income received in those years. Pursuant to that decision the trustee filed income tax returns and paid the tax reported thereon for all subsequent years until 1952, and for the period January 1, 1952, to May 26, 1952. [R. 55-56.] Thus there is no dispute that until May 26, 1952, the trustee was operating the property of the bankrupt within the meaning of Section 52(a).

On May 26, 1952, an order of liquidation was filed below, directing the trustee to liquidate the assets and close the estate. However, the assets were not liquidated in 1952. To the contrary, it is stipulated that on March 18, 1954, much of the property of the bankrupt which came into the hands of the trustee still remained unsold. [R. 57.] And there is no evidence of record that the actual operations of the trustee changed on May 26, 1952. To the contrary, there is evidence which indicates that the trustee's operations continued unchanged. [R. 49-54.]

Nevertheless, the trustee has disclaimed liability for federal income taxes after May 26, 1952, contending that, because of the entry of the order of liquidation on that date, he could not thereafter be deemed to be operating the property or business of the bankrupt. [R. 56.] The referee in bankruptcy sustained this contention by order of March 24, 1954, ruling [R. 59] that the—

order of liquidation of the referee dated May 26, 1952, terminated the trustee's authority to conduct the business of the bankrupt and said trustee was not, subsequent to May 26, 1952, operating said property or business within the meaning of Section 52 of the Internal Revenue Code.

The referee's order was in turn affirmed by the District Court's order of July 16, 1954, from which this appeal is taken. [R. 113-114.]⁴

There is, then, no question of fact involved on this appeal. The sole question presented is one of law: Does the mere entry of an order of liquidation in bankruptcy proceedings, of its own force and effect and without regard to the activities of the trustee, avert the application of Section 52(a)? We submit that both the statute

⁴The District Court, in affirming the referee's order, appears to have been laboring under a misapprehension as to the facts, for it stated in a preliminary order [R. 112]:

The only question before the Court is whether the Referee was justified in disallowing the claim for taxes on income derived *after liquidation*. The Court is of the view that *from the moment of liquidation*, the Trustee was no longer operating the business. * * * (Italics supplied.)

The undisputed facts, as pointed out above, reveal that the estate of the bankrupt was not liquidated as of May 26, 1952—or indeed at any time during 1952. The record shows only entry of the order of liquidation on May 26, 1952, plus retention of substantial assets by the trustee until 1954.

and the decided cases compel a negative answer to this question, and hence that the order appealed from must be reversed.

Section 52(a) of the Internal Revenue Code of 1939, provides in part that—

In cases where * * * trustees in bankruptcy
* * * *are operating the property or business of*
corporations, such * * * trustees * * * shall
make returns for such corporations in the manner and
form as corporations are required to make returns.
(Italics supplied.)

Plainly, this provision states only one requirement for its application, namely, that the trustee shall be “operating the property or business” of the bankrupt. There is no further proviso or condition whatever limiting the application of this provision. What, then, is meant by the controlling phrase, “operating the property or business” of the bankrupt corporation?

An explicit definition of what is meant by the phrase, “operating the property or business,” as used in Section 52(a), is given in Section 39.52-2 of Treasury Regulations 118, *supra*, which provides that—

If a receiver has full custody of and control over the business or property of a corporation, he shall be deemed to be operating such business or property within the meaning of section 52, whether he is engaged in carrying on the business for which the corporation was organized or only in marshaling, selling, and disposing of its assets for purposes of liquidation. * * *

This provision of the Regulations, in the light of its history, must be deemed to have the force of law. It made its first appearance in Article 52-2 of Treasury Regula-

tions 86, promulgated under the Revenue Act of 1934, and has appeared successively, without modification, in Treasury Regulations 94, 101, 103, 111, and 118. The relevant provision of Section 52(a) of the 1939 Code, quoted above, formed a part of Section 52 of the Revenue Act of 1934, c. 277, 48 Stat. 680, and was successively reenacted without modification in the Revenue Act of 1936, c. 690, 49 Stat. 1648, the Revenue Act of 1938, c. 289, 52 Stat. 447, and the Internal Revenue Code of 1939. Thus, both the statutory and the regulatory language quoted above have been in continuous force and effect since 1934. Congress reenacted the statutory provision three times without change and without indicating any disagreement with the continued administrative practice evidenced by the quoted provision of the Treasury Regulations. In so doing Congress must be deemed, under well-settled principles, to have approved the regulatory language as a correct interpretation of the statute.⁵

Commissioner v. Munter, 331 U. S. 210, 215;

Crane v. Commissioner, 331 U. S. 1, 8;

Commissioner v. Flowers, 326 U. S. 465, 469, rehear. den., 326 U. S. 812;

⁵It may be noted further that in the new Internal Revenue Code of 1954, Congress has gone even further than the provision of Treasury Regulations 118 quoted in the text, providing in Section 6012(b)(3) that—

In a case where a * * * trustee in bankruptcy * * * by order of a court of competent jurisdiction, by operation of law or otherwise, has possession of or holds title to all or substantially all the property or business of a corporation, whether or not such property or business is being operated, such * * * trustee * * * shall make the return of income for such corporation in the same manner and form as corporations are required to make such returns.

Legislative history identifies this provision as a “*clarifying change* from the wording of existing law.” (Italics supplied.) (H. Rep. No. 1337, 83d Cong., 2d Sess., p. A396.)

Boehm v. Commissioner, 326 U. S. 287, 291-292,
rehear. den., 326 U. S. 811;

Douglas v. Commissioner, 322 U. S. 275, 281.

Since, then, the pertinent provision of Treasury Regulations, quoted above, has the force and effect of law, it follows that in determining whether a trustee in bankruptcy is "operating the property or business" under Section 52(a), it is immaterial whether the trustee's activities are or are not directed to the liquidation of the bankrupt. *A fortiori*, the mere entry of an order of liquidation, as here, without any evidence of implementation by the trustee—who retained substantial assets two years later—cannot of itself avert the application of Section 52(a). Without more, we submit, the order here appealed from should be reversed.

Moreover, there is ample confirmation of the Government's position, if confirmation be needed, in the decided cases. First and foremost there is this Court's decision in *United States v. Metcalf*, *supra*, in which it was held, in these same proceedings, that the trustee was "operating the property or business" of the bankrupt within the meaning of Section 52(a) during 1938 and 1939. That case was decided, of course, before the entry of the order of liquidation here involved; but its rationale is fully broad enough to require reversal in the case at bar. This Court said (p. 679):

The trustee contends that even if this income was acquired by him in the operation of the bankrupt's property, it is not taxable because the trustee's ultimate objective was the liquidation of the entire estate. That is to say, he would have the pertinent sentence of Section 52 read "*Except where the property of the estate is ultimately to be liquidated, * * * trustees*

*in bankruptcy * * * operating the property * * *
of corporations * * * shall make [income tax]
returns," etc.*

We can see no reason why in an act to raise revenue there should be imputed to Congress such an exception of the principal portion, indeed almost all of, the area of income producing activities in bankruptcy proceedings. When the trustee is operating the properties of a bankrupt corporation it is none the less such operation though of properties ultimately to be liquidated. *Cf. Magruder v. Washington, etc., Realty Corp.*, 316 U. S. 69, * * *.

This sound reasoning is just as applicable to the situation after the entry of the order of liquidation on May 26, 1952, as to the situation before such entry. The order neither directed nor resulted in immediate liquidation. After its entry the trustee continued to hold and operate the property of the bankrupt with the ultimate objective of liquidating the entire estate—just as this Court said he held and operated the property in 1938 and 1939.

This Court said further in the *Metcalf* case (p. 679) that "It is what the trustee does which determines his tax liability," not the entry or non-entry of orders with respect to operation or disposition of the bankrupt's estate. Here the trustee's activities admittedly constituted operation of the bankrupt's property under Section 52(a) until May 26, 1952; and there is no evidence that his activities changed on that date. Therefore, under the rationale of the *Metcalf* case, as well as under the statute and Treasury Regulations, the trustee continued to operate the property of the bankrupt throughout 1952.

Also squarely in point is *Louisville Property Co. v. Commissioner*, 140 F. 2d 547 (C. A. 6th), cert. den., 322

U. S. 755. There it was held that the assignee of corporate property, engaged in its orderly liquidation, was subject to the requirements of Section 52 of the Revenue Acts of 1934 and 1936, which so far as pertinent to that case, as to the case at bar, was identical in wording with Section 52(a) of the Internal Revenue Code. The court rejected the contention of the assignee that (p. 548)—

Liquidation * * * is the opposite of carrying on business even though income may be realized from the disposal of assets. Hence, he insists, he was not operating the business of the Louisville Property Company, because it had gone out of business, nor its property, because that had been conveyed absolutely for the benefit of creditors and stockholders and the corporation had no further interest in it.

Citing *Magruder v. Realty Corp.*, 316 U. S. 69, wherein the Supreme Court upheld the validity of a provision of Treasury Regulations 64, which classified as “doing business” by a corporation the orderly liquidation of its property, the court in the *Louisville Property Co.* case went on to say (p. 549):

While the present case differs from the *Magruder* case in that the assignee is not a corporation, we think it clear that the orderly liquidation of property over a period of years, with the purpose of making sales under the most advantageous circumstances, and in the meanwhile contracting for collection of royalties and removal of standing timber, constitutes the carrying on of a business within the rationale of the *Magruder* case, and it will be observed that the operations of the original and successor assignees continued * * * through the tax years, and so far as we are advised, are still being pursued.

So in the case at bar, the most that can be said of the activities of the trustee, after the entry of the liquidation order as well as before, is that they were directed to "the orderly liquidation of property over a period of years, with the purpose of making sales under the most advantageous circumstances"; and that in the meanwhile the trustee was collecting oil royalties and other forms of income from the property.

Finally, the court in the *Louisville Property Co.* case cites with approval this Court's decision in the *Metcalf* case as (p. 549) "An almost identical case" in which "facts are indistinguishable from those in the present case."

Pinkerton v. United States, 170 F. 2d 846 (C. A. 7th), is another decision in point. In this case, decided in 1948 under Section 52(a) of the 1939 Code, the court held that Section 52(a) applied to the receiver of a corporation who collected rents which would have been taxable to the corporation, paid real estate taxes, and sold real estate at a profit. As to the familiar argument that liquidation is not operation of property or business, the court cited with approval *State v. American Bonding & Casualty Co.*, 225 Ia. 638, 281 N. W. 172, saying with respect to that case (p. 848):

The trustee contended that even if this income was acquired by him in the operation of the bankrupt's property, it was not taxable because his ultimate objective was the liquidation of the entire estate. The court held that it is what the trustee does that determines his liability, and since he had collected various kinds of income from the properties, he was doing business within the meaning of Section 52 of the Revenue Act. * * *

The court in the *Pinkerton* case made the further point that it is immaterial whether the receiver's activities be of short or long duration, saying (p. 848) that Section 52(a) does not "require any particular amount of business in order to bring a company within its terms."

In accord on its reasoning with the above decisions, though decided under a different statute, is *In re Loehr*, 98 Fed. Supp. 402 (E. D. Wis.). The provision involved was 28 U. S. C., Section 960, which provides:

Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

In that case a trustee in bankruptcy was appointed who was directed by the court to liquidate the estate, which included many parcels of real estate. The trustee sold the real properties over a period of approximately three years at a net profit, and also collected rentals on unsold properties. The trustee resisted collection of federal income taxes on the rentals and proceeds of sales, contending that (p. 403) "since the trustee had authority only to liquidate, he was not 'conducting any business' and that therefore the statute is not applicable." The court rejected the trustee's contention, saying (p. 403):

The same question arose in two reported cases which were brought to the attention of the court. In the case of *In re Mid America Co.*, D.C., 31 F. Supp. 601, 606, the court considered the question of "whether a trustee in bankruptcy is liable for contributions under the Illinois Unemployment Compensation Act with respect to individuals who perform services for him in connection with the bankrupt estate." The

court said: "Respondent's contention that this section applies only to trustees who are actually carrying on the business of the bankrupt, and not to liquidating trustees, is unconvincing. The phrase 'conduct any business' should not receive a narrow and restricted interpretation, but should be construed to include any activity or operation in connection with the handling and management of the bankrupt estate. * * *"

The case was considered and approved by the Court of Appeals for the Eighth Circuit. In the case of *State of Missouri v. Gleick*, 135 F. 2d 134, 137, the court said: "The reasoning of Judge Adair in the *Mid America* case seems sound, and, in the absence of a controlling authority to the contrary, we adopt it here. * * *"

This court, too, believes that the *Mid America* case properly construed the statute and the court therefore holds that the claim of the state and federal government for income taxes against the trustee should have been allowed.

We submit that both the provisions of 28 U. S. C., Section 960, and the reasoning of the courts in the *Loehr*, *Mid America* and *Gleick* decisions are fully applicable to the case at bar and provide further confirmation that a liquidating trustee in bankruptcy is liable for federal income taxes.

In Feigenbaum, *The Bankruptcy Triangle: Creditor-Debtor-Commissioner*, 30 *Taxes, Tax Magazine* 448 (1952), it is said of the *Loehr* decision in the course of an illuminating survey of the law on the question here involved (p. 463):

While the *Loehr* case involved a trustee in bankruptcy for an individual rather than a corporation, Section 960, unlike Code Section 52(a), does not dis-

tinguish between an individual and a corporation. Accordingly, it is believed that this case reinforces the proposition that under the provisions of Code Section 52, a trustee in bankruptcy liquidating a corporation is required to file a federal income tax return and pay the tax based upon the income realized as a result of such liquidation.

In sum, then, under Section 52(a), the relevant provisions of Treasury Regulations—which have the force of law—and the decided cases discussed above, it is clear that a trustee in bankruptcy is “operating the property or business” of the bankrupt, if he be in active control of the assets, regardless of whether those assets are being held with the ultimate objective of liquidation or, indeed, are being marshaled and sold in the course of liquidation.

The two decisions cited to the contrary by the District Court [R. 112-113] are distinguishable from the case at bar. The first, *In re Owl Drug Co.*, 21 Fed. Supp. 907 (Nev.), was a case where the trustee in bankruptcy had sold all the assets of the bankrupt and deposited the proceeds of the liquidation in various banks, pending distribution arrangements; and the sole question was whether interest earned by the deposits was income which the trustee was required to report under Section 52(a). The court pointed out, correctly (p. 910), that the interest was earned, not by the property or business of the bankrupt, but by the money into which the business had been transmuted by the sale. Thus this case was soundly distinguished in the *Louisville Property Co.* case, *supra*, as being (p. 549) “decided with respect to income arising after the business of liquidation was completed and the property of the corporation entirely disposed of.” So far as the reasoning of the court in the *Owl Drug Co.* case

went beyond the situation before it, and may be read to conflict with the cases discussed above, it is surely not sound law. The decision ignored the long-standing provision of Treasury Regulations discussed above, and has been criticized on that ground in 3 Collier on Bankruptcy, Sec. 62.14 (14th ed.), quoted in Feigenbaum, *The Bankruptcy Triangle*, *supra*, p. 461.

The other decision cited by the District Court, *California State Board of Equalization v. Goggin*, 191 F. 2d 726 (C. A. 9th), is irrelevant to the case at bar because the construction and application of Section 52(a) were not involved. The question was whether liquidation sales made by a trustee in bankruptcy pursuant to court order were subject to a California sales tax; and under the California law involved the further question was whether the sales were made in the course of continued operation of the bankrupt's business. Obviously, in the light of the foregoing discussion of Section 52(a), the pertinent provisions of Treasury Regulations, and decided cases thereunder, the scope of the phrase, "operating the property or business" of the bankrupt, reaches far beyond the mere continued operation of the business which the corporation pursued before it was adjudicated bankrupt. As has been demonstrated, Section 52(a) applies to liquidating trustees in bankruptcy as well as to trustees who are continuing the business of the bankrupt; and, *a fortiori*, it applies in the case at bar where the trustee necessarily relies upon the mere entry of an order of liquidation.

Conclusion.

For all of the foregoing reasons, we submit that the order of the District Court here appealed from was in error and should be reversed.

Respectfully submitted,

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
GRANT W. WIPRUD,
*Special Assistants to the
Attorney General.*

LAUGHLIN E. WATERS,
United States Attorney,

EDWARD R. McHALE,
Assistant United States Attorney.

February, 1955.

No. 14569

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate
of F. P. Newport Corporation, Ltd., Bankrupt,

Appellee.

BRIEF FOR THE APPELLEE.

GEORGE BOUCHARD,

NORMAN A. BAILIE,

900 Wilshire Boulevard,
Los Angeles 17, California,

Attorneys for Appellee.

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No. 14569

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

PAUL W. SAMPSELL, Trustee in Bankruptcy for the Estate
of F. P. Newport Corporation, Ltd., Bankrupt,

Appellee.

BRIEF FOR THE APPELLEE.

This is an appeal from an Order of the United States District Court for the Southern District of California, disallowing the claim of appellant for Federal Income Taxes for the year 1952. The grounds for entering the Order appealed from are set forth in a preliminary order of the District Court filed July 6, 1954. [R. 112-113.]

Questions Presented.

Appellant states the question involved too broadly. (App. Br. p. 3.) The precise question involved in this appeal is whether the Order of the Court, dated May 26, 1952, ordering the liquidation of the assets, terminated the Trustee's authority to conduct the business.

Statement.

Appellee adopts the statement of facts as set forth by Appellant in its Brief, pages 5 and 9, inclusive.

Argument.

The Appellant relies primarily upon three Courts of Appeals' opinions, namely:

United States v. Metcalf, 131 F. 2d 677 (C. A. 9th);

Louisville Property Co. v. Commissioner, 140 F. 2d 547 (C. A. 6th);

Pinkerton v. United States, 170 F. 2d 846 (C. A. 7th).

None of these cases establish any conflict with the decision below. All the Court held in each of these cases was that the activities of the Trustees in Bankruptcy in the years before the Court constituted the operation of the business and property of the bankrupt corporation, and subjected the Trustee to taxation, although the Trustee was holding the assets for ultimate liquidation. The Court, in both the *Pinkerton* and *Louisville Property Co.* cases quote with approval the decision of this Court in the *Metcalf* case. As a matter of fact, the Sixth Circuit in the *Louisville Property Co.* case states that the *Metcalf* case is "an almost identical case."

None of the cases relied upon by Appellant passed upon the point involved in the present case. The decision of the Court below does not conflict with the decision of this Court in the *Metcalf* case. All this Court decided in that case was that the activities of the Trustee during the years 1938 and 1939 constituted "operation of property or business" so as to render the Trustee liable for tax on income from such business under Section 52 of the Revenue Act of 1938. The fact that the ultimate objective of the Trustee in bankruptcy was the liquidation of

the entire estate did not relieve the Trustee from liability for tax on income acquired in the operation of the bankrupt's property. The opinion does not have the effect of determining that the activities of the Trustee in subsequent years amounted to carrying on of business or operating the property.

None of the cases cited by Appellant passed upon the question of the effect of an order of liquidation. The only case which has passed upon this precise point appears to be the opinion of this Court in the case of the *California State Board of Equalization v. Goggin*, 191 F. 2d 726. That case was an action by the California State Board of Equalization against the Trustee in Bankruptcy of the West Coast Cabinet Works, Inc., to recover state sales tax claimed to be due as a result of defendant's sale of certain trucks.

On February 5, 1946, West Coast Cabinet Works, Inc., a corporation, engaged in manufacturing and selling cabinets at retail in California, filed a petition under Chapter 11 of the Bankruptcy Act, and George T. Goggin was appointed receiver. From February 5, 1946, until March 11, 1946, Goggin, as receiver, conducted the business of the corporation under authority of the court, made retail sales, and paid the California sales tax thereon. On March 12, 1946, the corporation was adjudicated a bankrupt and Goggin was appointed Trustee. He continued to conduct the business of the bankrupt until March 22, 1946, and paid the California sales tax on retail sales made.

On March 22, 1946, the trustee was directed by order of the court to sell the assets of the estate. In carrying out the order, the trustee made numerous sales of the

personal property of the bankrupt and paid the California sales tax thereon. On March 29, 1946, the trustee sold at retail, at public auction, five trucks which had been used by the bankrupt for delivery purposes in the conduct of the business. The California sales tax was not added to the purchase price and the sales were not reported in the bankrupt's sales tax return filed by the trustee.

The California State Board of Equalization made an additional determination of taxes owing from the trustee based upon the sale of the trucks, and notice of the assessment was mailed to the trustee. Upon the trustee's failure to make timely payment, a penalty was added to the amount claimed to be due.

On petition of the trustee, the Referee enjoined the California State Board of Equalization from enforcing against the trustee any of the provisions of the California sales tax claimed to be due as a result of the sale of the trucks. The district judge affirmed the referee's order.

The California State Board of Equalization contended that the record established that the five trucks were sold by the trustee "during a period in which he was operating the business of the bankrupt * * *." A stipulation entered into between the State Board of Equalization and the Trustee, stated that during the period from March 12, 1946, to May 1, 1946, George T. Goggin, as trustee for said bankrupt, was engaged in the sale of tangible, personal property at retail * * *." The evidence shows that sales of cabinets were made on April 23, 1946, and on May 14, 1946, after and pursuant to the liquidation order.

This Court affirmed the District Court. It held that the continued operation of a bankrupt business is a matter within the sound discretion of the court, and that when the court on March 22, 1946, ordered liquidation of the assets, the trustee's authority to conduct the business terminated.

The Appellant, in its Brief, passes off this case as irrelevant to the case here because the construction and application of Section 52(a) of the Internal Revenue Code were not involved. Appellant assumes that this court decided that the order of liquidation terminated the trustee's authority to conduct the business in so far as a state tax was concerned, but that it had not terminated his authority in so far as the collection of any federal tax was concerned. So far as the language of the court is concerned, the order of liquidation terminated the trustee's authority for all purposes. Judge Fee, in a concurring opinion, points out that the power of Congress to pass uniform laws in relation to bankruptcies is paramount, and that the statutes so enacted emphasize the necessity of liquidation in order to make distribution of assets. Congress has given the Bankruptcy Court plenary powers to that end, and that acting under these powers, the referee ordered a liquidating sale of certain trucks; that a tax on this transaction, whatever form it takes, is a tax on the process of the Court liquidating assets in accordance with constitutional power; that such tax may also be considered as a license fee required of a federal officer to make liquidation. In either event it is void.

The District Court in affirming the referee's order denying the claim of the Government for taxes on receipts by

the trustee subsequent to the order of liquidation, relied on the opinion of this Court in *California State Board of Equalization v. Goggin* [R. 112-113].

The decision of the Court below was clearly correct, and is in accordance with the decision of this Court in the *Goggin* case. We respectfully submit that it should be affirmed.

GEORGE BOUCHARD,

NORMAN A. BAILIE,

Attorneys for Appellee.

No. 14,574

IN THE

United States Court of Appeals
For the Ninth Circuit

STEPHEN F. HERINGER, MABEL H. HER-
INGER, JOHN F. HERINGER, and ALTA
G. HERINGER,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for Review of the Decision of the
Tax Court of the United States.

BRIEF FOR THE PETITIONERS.

R. E. H. JULIEN,

220 Bush Street, San Francisco 4, California,

Attorney for Petitioners.

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Respondent.

On Petition for Review of the Decision of the
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BRIEF FOR THE PETITIONERS.

OPINION BELOW.

The findings of fact and opinion of the Tax Court
(R. 84-89) are officially reported in 21 T.C. 607.

JURISDICTION.

These cases involve gift taxes. The Commissioner's
notices of deficiencies, one of which (R. 1, 11-15) is
printed pursuant to stipulation and order filed June
22, 1955 (R. 1, 122), were mailed to taxpayers on Jan-

uary 17, 1952. (R. 5, 11.) Within ninety days thereafter, and on April 11, 1952, the taxpayers filed their petitions, one of which is printed pursuant to stipulation and order filed June 22, 1955 (R. 1, 122), with the Tax Court for redetermination under Section 1012 of the 1939 Internal Revenue Code. (R. 1, 5-15.) The decisions of the Tax Court that there were deficiencies in gift taxes were entered June 11, 1954. (R. 1, 90-93.) These cases are brought to this Court by petition for review, filed August 9, 1954 (R. 1, 96-113), pursuant to the provisions of Sections 1141 and 1142 of the 1939 Internal Revenue Code, as amended.

QUESTIONS PRESENTED.

Were the transfers of the real property here involved intended as, or in fact, gifts to any person under subsections (a) and (b) of Section 1000 of the Internal Revenue Code of 1939?

Assuming these transfers of real property were subject to gift taxes, under Sections 1000 and 1002 of the Internal Revenue Code of 1939, what percentage of their value, having fair regard for the actual executed intention and on the specific facts of these cases, were taxable—60% or 100%?

Assuming also that these transfers were subject to gift taxes, to what person or persons, were such gifts made for purposes of allowing the \$3,000 annual exclusions under subsections (a) and (b)(3) of Section 1003 of the Internal Revenue Code of 1939? Was the

person or donee the corporation which held virtually naked legal title for the convenience of the shareholders? Or, were the persons or donees the eleven individual shareholders who, in fact, economically benefited from such transfers?

STATUTES AND REGULATIONS INVOLVED.

The statutes and regulations involved are set out in the Appendix, *infra*, pp. i-iii.

STATEMENT OF THE CASE.

The Tax Court explicitly found some of the facts in its Findings of Fact and Opinion. (R. 84-89.) Other facts, the Tax Court implicitly found through incorporation of the record by reference. Said Judge Oppen: "Part of the facts were stipulated (R. 17-22, including Exhibits not printed) and are found accordingly. Other facts were established by oral testimony." (R. 85, 23-84.)

Petitioners shall hereinafter urge that there is no substantial evidence to support the findings upon which the Tax Court apparently predicates its opinion and decisions in these cases. This Court of Appeals will, of course, draw its own inferences from the undisputed facts and give consideration to the entire evidence to decide whether a mistake has been made in these cases. *Lucille McGah, et al., v. Commissioner*

of *Internal Revenue*, 9 Cir. 1954, 210 Fed. (2d) 769; *Gillette Estate et al. v. Commissioner*, 9 Cir. 1950, 182 Fed. (2d) 1010. Accordingly, we shall endeavor to exclusively glean from this record the "entire evidence" upon which these cases are believed to turn.

Stephen and John Heringer are brothers. They have lived near Clarksburg, California since 1901. (R. 24, 36.) They have been in the farming business all of their lives. (R. 24, 36.) Stephen and John have farmed as partners in the Clarksburg area since their father died in 1912 or when Stephen was 23 years old. (R. 26, 27, 36.) Stephen and his wife, Mabel, were married October 2, 1912, and they had eight boys, six of whom are living. At the time of the trial in March of 1953, the youngest son was 20 and the remaining five ranged in age from 32 to 40 years. (R. 24-25.) John and his wife, Alta, have five children—four boys and a girl; and, at the time of the trial in March 1953, they ranged in age from 25 to 35 years. (R. 36.) All of the eleven children of Stephen and John Heringer were raised to, did, and do work on the families' farms in varying degrees—depending on age and whether away at school or in military service. (R. 24-84.) In this matter of work, particular note may be made of the testimony of Stephen's oldest son, Frederick:

"Q. And when did you start farming?

A. The day I was able to lift a shovel, you might say.

Q. During the time you were in school, were you—during your vacations, did you work on the farm?

A. Very definitely.

Q. Did you work hard, or did you have an easy time of it?

A. In my opinion, I slaved at it." (R. 54.)

The uncontradicted testimony at the trial before Judge Van Fossan of Frederick J. Heringer (R. 55) and the other children, amply supports the fact that, without the younger generation's working efforts, these large farming operations would not have prospered so well as they have. (Genette Heringer Whisenhunt, R. 41 et seq.; Donald S. Heringer, R. 67; Lester Heringer, R. 73; Wilfred Heringer, R. 75; John F. Heringer, Jr., R. 77; and George Heringer, R. 79.)

It would appear obvious that the Senior Heringers had definite business reasons for keeping their children working on the farm, in the family business, and not looking elsewhere for opportunities which might offer them a seemingly better future. See testimony of Frederick Heringer. (R. 52-56.)

Until 1942 all of the children of Stephen and John Heringer, old enough to work and at home, were paid "wages" by the parents' partnership. (R. 59, 60, 68.)

In 1942 six of the eleven children, living and working on the farms, formed a partnership to rent from their parents the Pierson District Property, or property known as Vorden Farms. This property was farmed under lease from the four Senior Heringers by this six man Vorden Farms partnership from 1942 to 1949. It was also this same property which later became the subject of the transfers by the four Senior Heringers to Vorden Farms, Inc., a California cor-

poration, in 1948 and 1949. (R. 60-62; 23-84.) After 1942 Stephen and John Heringer continued, as they had done since about 1912, to farm the 1600 acre Holland property. (R. 26, 29, 57.) The Holland property is better land to farm and not as expensive to operate as the Pierson District property. (R. 58-59.)

The factual record seems abundantly clear that the children of the families of John Heringer and Stephen Heringer were raised in a rigorous and spartan manner. (R. 54.) Until late 1948 *only* six of the eleven children were allowed to farm for their own profit and then only a portion of the families' properties and business. Keeping their children on the farms was thus on a business-like and thrifty basis. Even in 1948 and 1949, the critical years here involved, the four Senior Heringers made transfers to a close corporation; it was family dominated (hereinafter see pre-emption rights and agreements not to sell stock to outsiders); and one in which they owned 40% of the stock. Similarly, that corporation was used as a vehicle to hold bare legal title for benefit of all of the fifteen shareholders. That property was also but one segment of the land capital of the Senior Heringers. It was also the hardest and most expensive land to farm. (Stephen, R. 29-32; John, R. 38-40; Frederick, R. 55-60.) The best farm land the Senior Heringers retained unfettered for themselves.

On the question of *why* these transfers in 1948 and 1949, we believe the complete record shows the following testimony to be quite likely of understatement:

Stephen F. Heringer,

“Q. Now, Mr. Heringer, what if any intention went on in your mind, or the purposes for which you made this transfer of the Pearson District property to this corporation in 1948 and '49? Why did you do it?

A. We wanted to keep it in one piece, and we thought probably the boys would farm it more successfully if they had an interest in it.” (R. 31.)

John F. Heringer:

“Q. Now, did you have any intention or purpose at the time you transferred for—what was your reason for transferring the Pearson District property, the 2,074 acres, in 1948 and '49 to the corporation as a—

A. Well, I thought we needed the boys' help and was trying to retain it.” (R. 38.)

Petitioners made requests for findings of the Tax Court (Op. Br., p. 5):

“That each petitioner, in each year 1948 and 1949, transferred the real property here involved to the Vorden Farms, Inc., as a contribution to its capital which was not subject to gift tax.” (Stip. of Facts, para. VII, R. 19-20; Exhs. 7-G, 8-H—not printed but permissible here per Stip., R. 121.)

“That each petitioner, in each year 1948 and 1949, intended to grant an economic interest to each of the eleven non-contributing shareholders in proportion to their shareholdings, not as a gift, but to strengthen the financial structure of their whole farming business, to create and stimulate the incentive of and induce their managerial and skilled

personnel to remain on the farms and in their business. (R. 31, 32, 38, 54-56, et al.) And, that the Petitioners were motivated by the primary desire, in making these transfers, not to make a gift but to try to insure a more efficient and profitable farming operation.” (R. 31, 38.)

The foregoing requests for such findings as to intention, purpose, and effect of who was to, and did benefit—the title holding corporation or shareholders, was largely ignored by the Tax Court. Apparently, the Tax Court thought these requests for findings related to what it thought was the irrelevance of the question of whether there was “donative intent” or not. This because Statute Section 1002, I.R.C. of 1939, deems as a gift transfers for less than adequate and full consideration in money or money’s worth. Application of Section 1002, in our view, was not in primary context in the foregoing requests for findings. The points were: (a) Can there be a “transfer . . . by any individual . . . of property by gift,” under Section 1000 (a), 1939 I.R.C., to a corporation of which he or she is a substantial shareholder; and, (b) the non-contributing shareholders were not the objects of gifts as such, but necessary (tantamount to a consideration by way of inducement) to the overall success of the transferors’ entire business interests; and, (c) who in fact were the intended objects or donees of the gifts if there were such under the tax statute,—individual people or their corporate pawn? (Cf., Pet. for Rev., R. 103-110.) Thus on the specific or unique facts of these Heringer cases, the explicit findings and

opinion of the Tax Court on the issues of "donative intent", and who were intended to, and did in reality benefit, are unclear and inadequate. It seems, therefore, that the implicit findings of the Tax Court, taken from the record, are at variance with its opinion.

Moreover, the quiet burial of certain facts in the record, that is, not expressed in the Tax Court findings and opinion, has worked a distortion of what should be the proper predicates for the applicable legal principles involved in these cases. The Stipulation of Facts is printed in the record, which is here in this Court. (R. 17-23.) But the *Exhibits* which illumine and implement the generality of phrasing in the stipulation of facts are not printed. However, these may be referred to here. (Per Stip., R. 121.) In considering the "entire evidence" this Court may wish to know in historical continuity that the Articles of Incorporation filed January 5, 1948 (Stip., Exh. 1-A), provided on page 2, par. Sixth: "That the shareholders shall have preemptive rights to subscribe to any and all issues of shares or securities of said corporation."

In this connection too, at the first meeting of all of the shareholders of Vorden Farms, Inc., the minutes reflect the following (Stip., Exh. 4-D):

"Agreement was also reached that without amendment of the Articles or By-Laws no shareholder would sell or assign to other than an original shareholder or shareholders any of his or her shares in Vorden Farms, Inc., without first notifying and allowing the corporation thirty days'

time in which to purchase the said shares offered for sale or to be assigned at their fair and reasonable book value at the beginning of the calendar year in which the said written proposal to sell or assign occurs.”

In the Application to Issue Stock before the Corporation Department of the State of California (Stip. Exh. 2-B) it was represented (p. 1):

“Said Frederick J. Heringer and Donald S. Heringer are incorporating this business for themselves and their relatives and do not intend to sell stock on the open Market.”

Before any of the transfers here involved were made, we find a clearly expressed understanding of all concerned on this question of *intention* and *purpose*; not “explanation” after action or transfer as may be inferred in the findings and opinion of the Tax Court. (R. 87.) This expressed understanding occurred at the special meeting of the Board on December 24, 1948 (Stip. Exh. 7-G):

“* * *. The effect of such contribution to the capital of this corporation *will be* to benefit the other eleven shareholders to the extent of their aggregate three-fifths ($3/5$) of the value of said one-half ($1/2$) interest in the land so conveyed, in proportion to their respective shareholdings in Vorden Farms, Inc. As an example, the owner of 2500 shares benefits to the extent of one-twentieth ($1/20$) of the value of the three-fifths ($3/5$) conveyed. * * *.” (Emphasis supplied.)

Acceptance on the foregoing basis was also made of record in those minutes.

Again at the Special Meeting of the Board on January 5, 1949 it was stated as manifestation of purpose, contemporaneous with action and not "explanation" afterwards (Stip. Exh. 8-H):

"The Senior Heringers thought, among other things, that the whole of the farm lands in question could better and more economically be operated as a complete and integrated unit."

And, on the nature of this particular corporate fiction, as expressed in the minutes of the Special Meeting of the Board on January 15, 1949 (Stip. Exh. 9-I) we find:

"The corporation was presently *organized and operating primarily* to hold the title to the lands in question." (Emphasis supplied.)

It is true that when the Articles of Incorporation were originally prepared and as filed early in the year 1948, namely, on January 5, 1948, they recited the general purposes for which the corporation was formed, to wit: "Generally, to carry on and do all things pertaining to the conduct of a farming, ranching, and agricultural business; * * *" (R. 18, Exh. 1-A, R. 86.) But it is equally true that, like all customarily drawn articles, this corporation *could have run a railroad*. (Exh. 1-A, p. 2.) However, we believe the accepted test is *not what the corporation could do but what it did do*, under its charter. It is similarly a fact that the purposes or prospective functions of the corporation changed between January 5, 1948, when the two oldest boys of John and Stephen and their attorney, organized the corporation, and

in December 1948 when the rest of the families, particularly the four Senior Heringers, were agreeable to going along. So it would seem the generality of purposes and objects of the Articles of Incorporation in January 1948 should give way to the realities of function, conduct, and operation under the conditions as they existed and were acted upon in December 1948 and the following years.

The preceding distilled version of the facts, history and actions of the personalities involved patently shows that the Senior Heringers were not uncertain about the direction they wanted to go, and who, in fact, was to benefit. Certainly Vorden Farms, Inc., was not the intended nor real donee.

The Commissioner and Tax Court have determined that on this record:

1. A gift was made under the tax laws, even though none was intended in point of fact.

2. The corporation was the sole donee, not the eleven children, whether the facts compelled a contrary executed intention or not.

3. The donors were their own donees to the extent of 40% of the value of property transferred even though the realities of ownership are squarely contrary to the mechanical means employed to transfer the nominal legal title to the corporation merely for the convenience of the shareholders. (See examples (a) and (b), Pet. for Review, R. 108-110.)

The "seamless web" of the facts in these cases cannot wind up in any one place in this brief and

there is need for some repetition, with the hope of not unduly belaboring this Court. The pertinent facts—all of those facts—should govern the result in these cases. Only Judge Van Fossan, who tried these cases, was fully aware of the vitality of the facts and of the people involved. His trenchantly terse dissenting opinion, on principle, is in eloquent contrast to the unrelated to the facts legalism of the majority opinion. (R. 89, 88.)

Arguments which may be construed as *ad hominem* are not regarded with favor. However, we should be less than honest if we were not to call to the attention of this Court what seems to us an inherent error in this type of fact case, in the reassignment by the Tax Court, for opinion writing, to a judge who did not try the cases, see the witnesses nor hear the live evidence. Moreover, the statement at the end of the Tax Court opinion “Reviewed by the Court” has little meaning to either the Court of Appeals or the parties on appeal where the Tax Court record does not show who and what number of the sixteen Tax Court Judges participated in the decision of the majority. In *Julius L. Stern, et al. v. Commissioner* (3 Cir. 1954), 215 Fed. (2d) 701, Judge Maris, for a unanimous Court of Appeals reversal of a decision of the Tax Court, makes abundantly clear what we are trying to indicate here.

In the *Stern* case, Tax Court Judge Hill, who tried the case, dissented, as did Judge Van Fossan, in the case at bar, after a reassignment to Judge Oppen, who spoke for the stated majority, there as here. We

believe the *Stern* case has a similar parallel in these *Heringer* cases in that the Court of Appeals in the *Stern* case reversed a Tax Court decision which exaggerated a fiction contrary to the clear import of the facts in the record.

STATEMENT OF POINTS TO BE URGED.

The essential errors to be urged for reversal of the decisions of the Tax Court are:

1. The Tax Court erred in determining that there was a taxable gift to this particular corporation or any taxable transfers for gift tax purposes, on the specific facts of these cases, under an appropriate interpretation of the applicable Internal Revenue Laws.

2. If there were transfers taxable as gifts, only 60% of the value of the properties transferred were subject to the tax. This is particularly so, among other reasons, because the donors, owning 40% of the stock in the corporation, increased the value of their stock in the corporation to the extent of that 40%, and in lieu of the value in the real property transferred to the corporation. Any other construction of the factual situation here would be neither sensible nor right.

3. If there were taxable gifts involved, the real donees were the eleven individual children and not the corporation. This is so because the gift tax statute, as indicated by the Congressional intent and as interpreted by the Courts, taxes the actual shifts of economic and beneficial ownership, which ownership, after the transfers, was

in the individual children and not the corporation interposed for the convenience and under the dominance of the shareholders. Accordingly, eleven \$3,000 exclusions were properly allowable to each transferor for each year rather than a single exclusion as determined by the majority of the Tax Court.

We have delineated above the “essential errors” to be argued in this brief. We understand such recital does not preclude this Court and counsel from considering or urging any of the 27 particular specifications of error set forth in the Statement of Points accompanying the Petition for Review in this Court. (R. 116-121, 96-113.)

SUMMARY OF ARGUMENT.

The Tax Court was wrong in finding and holding that these transfers were taxable gifts. Grossly wrong in finding and holding these transfers as taxable gifts to their “full extent.” Plainly wrong in failing to disregard the corporate entity, on the specific facts of these cases, and to find and hold the individuals and not the corporation were the donees. Obviously wrong in finding and holding that the corporation was the “person” or donee for purposes of the \$3,000 annual exclusion rather than each of the eleven children—being the “persons” or individuals to whom the transfers were, in point of fact and under the gift tax law, made.

ARGUMENT.

The dominant facts are the most convincing argument to support the contentions urged in behalf of these petitioners. Those facts are in the record.

Agreeable, we trust, to the soundness of the foregoing point of view, we hereinafter list by appropriate and abbreviated references, the citations which we believe this Court, in relating the applicable rules of law to the particular facts of these cases, may wish to consider in the appeal at this juncture.

1. On the question of these transfers taxable as gifts, and the extent thereof:

1939 Internal Revenue Code, as amended.

Sec. 1000—IMPOSITION OF TAX

(a) For the calendar year 1940 and each calendar thereafter, a tax, computed as provided in Section 1001, shall be imposed upon the transfer during such calendar year *by any individual*, resident or non-resident, *of property by gift* * * * (Emphasis supplied.)

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the *gift* is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *. (Emphasis ours.)

Treas. Reg. 108, Sec. 86.2 Transfers reached

(a) In general—The statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or in-

tangible. * * * In the following examples of transactions resulting in taxable gifts, it will be understood that the transfers were not made for an adequate and full consideration in money or money's worth.

(1) *Transfer of property by a corporation to B is a gift to the latter from the stockholders of the corporation. If B himself is a stockholder, the transfer, not being a distribution from earnings or in liquidation to which B is entitled as a stockholder, is a gift to him from the other stockholders* * * *. (Emphasis ours.)

Comment: The converse situation and argument is made in R. 103-107.

Ways and Means Committee House Report, Revenue Act 1932 H.R. No. 708, 72 Cong., 1st Sess., p. 28; 26 U.S.C.A. Int. Rev. Acts, p. 580.

“The words ‘transfer * * * by gift and whether * * * direct or indirect’ are designed to cover and comprehend all transactions—whereby and to the extent (Sec. 503) that property or a property right is donatively passed to or conferred upon another, *regardless of the means or the device employed in its accomplishment.* For example, (1) *a transfer of property by a corporation without a consideration, or one less than adequate and full in money or money's worth to B would constitute a gift from the stockholders of the corporation to B.* (Compare, example (1), of Reg. 108, Sec. 86.2 (a), *supra*); (2) *a transfer by A to a corporation owned by his children would constitute a gift to the children* * * *.” (Emphasis and indicated comparison supplied.)

Comment: Example (2), *supra*, was not recognized in later regulations. But why is it not reasonably to be implied?

Cases:

Burnet v. Guggenheim (1933), 288 U.S. 280, 286. See Petition for Review (R. 104);

Helvering v. Hutchings (1941), 312 U.S. 393, 395, 397. See Petition for Review (R. 104-107);

A. Gregory v. The State of California, 77 Cal. App. (2d) 26, 174 Pac. (2d) 863 (R. 107);

Robert H. Scanlon (October, 1940), 42 BTA 997.

Frank B. Thompson (June 1940), 42 BTA 121 (In 1942, CA-6 remanded this case on stipulation and granted substantial refunds and purportedly recognized the theories advanced by petitioners and in Judge Van Fossan's dissent here. 42-1 U.S.T.C. par. 10165-6; also see CCH—Fed. Estate and Gift Tax Reporter, par. 3200.27 et seq.)

Emily C. Collins (1943), 1 T.C. 605, at 608, 610. (Judge Oppen agreed with the rationale of Judge Mellott's dissent, which agreement seems patently inconsistent with his present opinion here on review. Also see, CCH—Fed. Estate and Gift Tax Reporter, par. 3130.20.)

2. On the question of the number of exclusions and disregard of the corporate entity, on the specific facts of these cases, together with the added fact that the Congress and the Courts seem clear in subjecting to

the gift tax statute only individuals as persons and not corporations.

1939 Internal Revenue Code, as amended

“Sec. 1003—*NET GIFTS*

(a) *General Definition*—The term ‘net gifts’ means the total amount of net gifts made during the calendar year, less the deductions provided in Section 1004.

(b) *Exclusion from gifts*

(1) * * *.

(2) * * *.

(3) *Gifts after 1942*—In the case of gifts (other than future interests in property) made *to any person by the donor* during the calendar year 1943 and subsequent calendar years, the first \$3,000 of *such gifts to such person shall not*, for purposes of subsection (a) be included in the total amount of gifts made during the year.” (Emphasis supplied.)

“Sec. 3797—DEFINITIONS

(a) When used in title, where not otherwise distinctly expressed or *manifestly incompatible with the intent thereof*—

(1) *Person*.—The term ‘person’ shall be construed to mean and include an individual, a trust, estate, partnership, company or corporation.”

Comment: The irrelevance of this general definitions section to an interpretation of the gift tax statute, as “manifestly incompatible with the intent thereof,” is clearly disposed of in the opinion of Mr. Justice Stone in the *Hutchings* case, *supra*, perti-

nent allusion to which is made in the Petition for Review. (R 103-107.)

Treas., Reg. 108, Sec. 86.10 Total amount of gifts
(See Appendix.)

Comment: While this Regulation recognizes the definition of “any person” to be the *individual* beneficiaries of a trust entity under the rationale of the *Hutchings* decision, it is silent on the application of Mr. Justice Stone’s definition in the context of the statute as applying to *only* “individuals” as real or beneficial owners where a family corporation is concerned. See, Petition for Review. (R. 104-107.)

Ways and Means Committee House Report, Revenue Act of 1932, H.R. No. 708, Supra, p. 17.

Comment: This Report, example (2), supra (pp. 18-19), is definitely in context on this second question on the number of \$3,000 annual exclusions allowed to each donor.

Cases:

Helvering v. Hutchings, supra;

A. Gregory v. The State of California, supra;

Emily C. Collins, supra, dissent, at p. 610;

Stephen F. Heringer, et al., dissent (R. 89);

U.S. v. Brager Building & Land Co., 124 F.
(2d) 349;

Heringer Bros. & Sons, 53 F. Supp. 716 (Government Appeal to CA9 dismissed April 3, 1944).

It is our belief that the Heringers’ gift tax cases sum up as follows:

1. There was no taxable gift to anyone as to the 40% of the value of the property here transferred.

The statute, Section 1000, certainly does not impose a gift tax upon the transfer "of property *by gift*", where, on the facts of these specific cases, no gift was intended by the transferors to themselves, and no such 40% of the property in point of ultimate fact, was effectively relinquished by them. In the first place, there were not present the elements of a common law gift. Secondly, there was no intended gift of the 40% to the corporation or to the individual shareholders. Third, the corporation on these facts was clearly a mechanical vehicle to effect the transfer of only 60% of the value of the land to the eleven individual shareholders. Further, see two examples and statement in R. pp. 108-110.

To arrive at the foregoing determination, certainly *there are here present facts* which are convincing to such a result, whether one relies on a sensible interpretation of the taxing statute; the regulations of the Commissioner; or the reasoning from the *Guggenheime* case, *supra*; the *Scanlon* case, *supra*; the *Hutchings* case, *supra*; the *Collins* case, *supra*, or even the *Thompson* case upon which the majority opinion of the Tax Court wholly relies. The *Thompson* case will hardly stand up as authority on the facts and on the reasoning of the majority opinion to the cases at bar. The facts here are distinguishable from the *Thompson* case. Nor can the *Thompson* case be correctly said to have "stood undisturbed by legislative, judicial or administrative action for upward of 13 years." (R. 88.)

Nor is the *Thompson* case distinguishable on its facts, or *in principle*, from the later *Scanlon* case. It is also at variance with the reasoning and legal principles which flow from the *Hutchings*' opinion and other analogous decisions. The fact that the *Thompson* case was settled, agreeable to this Point 1, is in itself of further considerable practical recognition of the controlling rule of law which should be applied in these *Heringer* cases.

2. On the question of the transfers of the 60% interest in the property, the eleven individual children were the donees for whom each donor was entitled to one annual \$3,000 exclusion.

If we look to the facts and clearly expressed intentions of the transferors, no gifts were intended to be made to anyone, neither at common law nor under Section 1000; *a fortiori*, this corporation was not intended as the donee of a gift under the statute. As Mr. Justice Stone aptly stated at page 396 in the *Hutchings* decision, *supra*: "One does not speak of making a gift to a trust rather than to his children who are its beneficiaries." Nor, we submit, to the corporation here.

However, it may be that the eleven individual shareholders who were actually intended to be benefitted for a consideration are faced with overcoming the application of Section 1002 of the taxing statute. This would be so because a Court could find that there was no "adequate and full consideration in money or money's worth" even though the parents had their practical business reasons for recognizing the past

services of their children and were looking to the future monetary success of their overall farming business. But see, *Estate of Monroe D. Anderson*, 8 T.C. 706. Also to be noted are the numerous cases where Courts have found "adequate" consideration under Section 1002 in husbands and wives settlements when incident to a divorce. It does not seem too much of an extension of the principle in these divorce cases to the specific facts in the *Heringer* cases by finding adequate consideration sufficient to overcome the application of Section 1002.

But assuming that there was a taxable gift under Section 1000 with respect to this 60% of the value of the property; and further assuming that there was not an adequate consideration under Section 1002, certainly the donee (or donees) was not the "person" of the corporation but the eleven individual "persons" or shareholders. This result should be true and right whether premised upon the manifested and uncontradicted intentions of the transferors; or a reasonable interpretation of subsections (a) and (b)(3) of Section 1003; or based on the analogous reasoning in the *Hutchings* case, *supra*; or, a fair interpretation of the Commissioner's regulations when placed alongside of the expressed Congressional intention, wherein it was stated that "the transfer by A to a corporation owned by his children would constitute a gift to his children".

In the light of the foregoing considerations, we submit that the decision of the majority of the Tax Court is unsound and at variance with the principles

stated by the Congress and enunciated in the governing U.S. Supreme Court and other apposite Courts' decisions.

CONCLUSION.

The decision of the Tax Court should be reversed.

Dated, San Francisco, California,

November 21, 1955.

Respectfully submitted,

R. E. H. JULIEN,

Attorney for Petitioners.

(Appendix Follows.)

Appendix.

Appendix

Internal Revenue Code of 1939:

“Sec. 1000. IMPOSITION OF TAX

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in Section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or nonresident, of property by gift. * * *

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *

* * * (26 U.S.C. 1940 ed., Sec. 1000)

“Sec. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year. (26 U.S.C. 1940 ed., Sec. 1002)

“Sec. 1003. NET GIFTS

(a) GENERAL DEFINITION—The term “net gifts” means the total amount of gifts made during

the calendar year, less the deductions provided in Sec. 1004.

(b) EXCLUSIONS FROM GIFTS—

(1) * * *

(2) * * *

(3) GIFTS AFTER 1942—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1943 and subsequent calendar years, the first \$3000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during the year.” (26 U.S.C. 1940 ed. as amended 1942, Sec. 1003)

“Sec. 3797. DEFINITIONS

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) *Person*.—The term ‘person’ shall be construed to mean and include an individual, a trust, estate, partnership, company or corporation.” (26 U.S.C. 1940 ed. Sec. 3797)

Treasury Regulations 108, promulgated under the Internal Revenue Code of 1939, as amended:

“Sec. 86.2. TRANSFERS REACHED

(a) *In General*.—the statute imposes a tax whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible. * * *

In the following examples of transactions resulting in taxable gifts, it will be understood that the transfers were not for an adequate and full consideration in money or money's worth:

(1) Transfer of property by a corporation to B is a gift to the latter from the stockholders of the corporation. If B himself is a stockholder, the transfer, not being a distribution from earnings or in liquidation to which B is entitled as a stockholder, is a gift to him from the other stockholders. * * *''

* * * * * *

“Sec. 86.10. Total amount of gifts.—Except with respect to any gift of a future interest in property, the first \$3,000 of gifts made to any one donee during the calendar year 1943 or during any calendar year thereafter shall be excluded in determining the total amount of gifts for such calendar year. In the case of a gift in trust, the beneficiary of the trust is the donee of the gift. * * *''

**In the United States Court of Appeals
for the Ninth Circuit**

STEPHEN F. HERINGER, MABEL H. HERINGER, JOHN F.
HERINGER, and ALTA G. HERINGER, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

H. BRIAN HOLLAND,
Assistant Attorney General.

ROBERT N. ANDERSON,
A. F. PRESCOTT,
MEYER ROTHWACKS,
*Attorneys, Department of Justice,
Washington 25, D. C.*

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**In the United States Court of Appeals
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No. 14574

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v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

*ON PETITION FOR REVIEW OF THE DECISIONS OF THE TAX
COURT OF THE UNITED STATES*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and the opinion of the Tax Court (R. 84-89) are reported at 21 T. C. 607.

JURISDICTION

The petition for review (R. 96-113) involves gift tax deficiencies for 1948 and 1949.¹ Notices of deficiencies

¹ The amounts involved are as follows (R. 90-93):

<i>Taxpayer</i>	<i>Year</i>	<i>Deficiency</i>
Stephen F. Heringer	1948	\$ 15,353.28
Stephen F. Heringer	1949	17,365.59
Mabel H. Heringer	1948	4,784.76
Mabel H. Heringer	1949	16,221.41
John F. Heringer	1948	15,353.28
John F. Heringer	1949	17,365.59
Alta G. Heringer	1948	4,784.76
Alta G. Heringer	1949	16,221.41
Total		<hr/> 107,450.08

covering all of the taxes were mailed to the respective taxpayers on January 17, 1952. (R. 11-15.)² On April 11, 1952, the taxpayers filed with the Tax Court petitions for redetermination, under the provisions of Section 272 of the Internal Revenue Code of 1939. (R. 3, 5-10.) The decisions of the Tax Court were entered on June 11, 1954. (R. 90-93.) The cases are brought to this Court by a consolidated petition for review filed on August 9, 1954. (R. 96-113.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

QUESTIONS PRESENTED

1. Whether the Tax Court correctly held that the transfers of property to a corporation by four individuals who were 40 percent stockholders in the corporation were gifts, under Section 1000 of the Internal Revenue Code of 1939.

2. Whether the Tax Court correctly held that the gifts were made to the corporation (with one annual exclusion to each taxpayer) and not to the remaining 60 percent of the non-contributing stockholders, the taxpayers' children.

3. Whether the Tax Court correctly held that the gifts were taxable to the full extent of their value, without diminution to the extent of the increase in value of the shares held by the donors.

STATUTE INVOLVED

Internal Revenue Code of 1939:

SEC. 1000. IMPOSITION OF TAX.

(a) For the calendar year 1940 and each calendar year thereafter a tax, computed as provided in

² By stipulation, the transcript of record on appeal contains the pleadings in the Tax Court of only one of the taxpayers.

section 1001, shall be imposed upon the transfer during such calendar year by any individual, resident or non-resident, of property by gift. Gift taxes for the calendar years 1932-1939, inclusive, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1932, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1932.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but, in the case of a non-resident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

(26 U. S. C. 1952 ed., Sec. 1000.)

SEC. 1002. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this chapter, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

(26 U. S. C. 1952 ed., Sec. 1002.)

SEC. 1003. NET GIFTS.

* * * * *

(b) *Exclusions from Gifts.*

* * * * *

(3) [as added by Section 454, Revenue Act of 1942, c. 619, 56 Stat. 798] *Gifts after 1942.*—In the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year 1943 and subsequent calendar years, the first \$3,000 of such gifts to such person shall not, for the purposes of subsection (a), be included in the total amount of gifts made during such year.

(26 U. S. C. 1952 ed., Sec. 1003.)

SEC. 3797. DEFINITIONS.

(a) When used in this title, where not otherwise distinctly expressed or manifestly incompatible with the intent thereof—

(1) *Person.*—The term “person” shall be construed to mean and include an individual, a trust, estate, partnership, company, or corporation.

* * * * *

(26 U. S. C. 1952 ed., Sec. 3797.)

STATEMENT

Some of the facts have been stipulated. (R. 18-22.) The additional findings of the Tax Court are as follows:

Stephen F. Heringer and John F. Heringer are brothers. Their respective wives are Mabel H. Heringer and Alta G. Heringer. These four persons

(referred to as the taxpayers) together owned approximately 2,074 acres of farm land in Sacramento County, California. (R. 85-86.)

On January 5, 1948, Vorden Farms, Inc. (referred to as the corporation) was organized to conduct a farming and agricultural business. On December 8, 1948, the corporation issued to the taxpayers and members of their two families 50,000 shares of stock at \$1 per share in exchange for \$50,000 in cash. The two families consisted of the taxpayers and their eleven children. Each of the 15 shareholders separately purchased the following amount of stock (R. 86):

	No. of shares
Stephen F. Heringer	5,000
Mabel H. Heringer	5,000
Frederick J. Heringer	2,500
Wilfred R. Heringer	2,500
Lester S. Heringer	2,500
James T. Heringer	2,500
Robert P. Heringer	2,500
Richard T. Heringer	2,500
John F. Heringer	5,000
Alta G. Heringer	5,000
Donald S. Heringer	3,000
John F. Heringer, Jr.	3,000
Genette Heringer	3,000
George Heringer	3,000
Ned Heringer	3,000

On December 14, 1948, a directors' meeting was held and officers were elected. On December 28, 1948, the taxpayers conveyed to the corporation an aggregate undivided one-half interest in the 2,074 acres owned by them. On January 5, 1949, they conveyed the re-

maining acreage to the corporation. The fair market value of the total acreage was \$641,443. At special meetings of the board of directors held on December 24, 1948, and January 3, 1949, resolutions were adopted accepting the realty contributions. It was explained at these meetings that the contributions would have the effect of benefitting the 11 noncontributing shareholders to the extent of their proportionate interests in the corporation. (R. 87.)

Prior to the incorporation of Vorden Farms, Inc., the taxpayers had leased the acreage in question to a partnership known as Vorden Farms, all of the members of which were children of the taxpayers. The corporation leased the land to a partnership of the same designation, comprising nine of the eleven children. The partnership actually engaged in farming the land. The corporation held title to the land, collected the rents, paid taxes and reclamation assessments, and distributed dividends. It paid salaries to its officers. (R. 36-37, 87-88.)

Each of the taxpayers filed gift tax returns for 1948 and 1949, respectively. The returns stated that the transfers of the acreage to the corporation were not gifts, and that if they were gifts, the donors retained a 40 per cent interest in the property transferred and each donor was entitled to 11 exclusions for gift tax purposes, determined by the number of the non-contributing stockholders. (R. 88.)

The Commissioner determined and the Tax Court held that the transfers were gifts to the corporation measured by the entire value of the land, and that each of the taxpayers was entitled to only one exclusion for each year. (R. 88.)

SUMMARY OF ARGUMENT

In holding that the transfers of property to Vorden Farms, Inc. by the taxpayer-donor-40 per cent stockholders in the corporation were *gifts* in their *entirety* to the corporation—and not, in part, to the taxpayers' children who were the remaining 60 per cent stockholders—and that, consequently, the taxpayers were each entitled to only *one annual exclusion* for gift tax purposes, the decisions below are correct on their facts and embody a proper application of established principles. The transfers were intended as gifts; and even if it is assumed, *arguendo*, that there was no donative intent, the record nevertheless fails to show that the transfers were made for an adequate and full consideration in money or money's worth. The transfers were made to the corporation alone, which, as a separate and distinct entity, engaged in business, could not be disregarded for tax purposes as a mere mechanical conduit for its stockholders. The transfers thus were gifts to a single entity, entitling the taxpayer-donors to only one exclusion each for each taxable year. If, on the taxpayer's hypothesis, the non-contributing stockholders were the intended beneficiaries of the transfers (to the extent of their 60 per cent interest in the corporation), their interests, in any event, would have been future interests, and no exclusions would have been allowed. The taxpayers divested themselves of all control over and interest in the property, in favor of the corporation, and the benefit to the non-contributing stockholders was indirect and derivative. The measure of the gifts was therefore the full value of the property in the hands of the taxpayer-donors.

ARGUMENT

I

The Transfers of the Acreage Were Gifts

Vorden Farms, Inc., was incorporated on January 5, 1948. All of the stockholders (the four taxpayers and their eleven children) paid in \$50,000 for the 50,000 shares of stock which were issued in December of that year. This contribution to capital was obviously supported by valuable consideration and was therefore excluded from the gift category. But the same conclusion may not be drawn with respect to the 2,074 acres which the taxpayers alone transferred to the corporation on two occasions approximately a year after the incorporation. Those transfers were made with donative intent. And even if it be assumed, *arguendo*, that the taxpayers had no donative intent, the transfers were not supported by "adequate and full consideration in money or money's worth * * *." Section 1002, Internal Revenue Code of 1939, *supra*. Accordingly (Cf. *Commissioner v. Wemyss*, 324 U.S. 303; *Merrill v. Fahs*, 324 U.S. 308, rehearing denied, 324 U.S. 888; *Horst v. Commissioner*, 150 F. 2d 1 (C. A. 9th), certiorari denied, 326 U.S. 761), they were gifts—whether regarded as gifts to the corporation, as the Tax Court held, or as gifts to the non-contributing stockholders, as the taxpayers alternatively contend. (Br. 22-23.)

The record does not show what consideration, if any, was given for the transfers of the acreage. On the contrary, the testimony on this aspect of the case supports the Tax Court's conclusion that the transfers were gifts. Thus, Stephen F. Heringer, one of the taxpayers was asked (R. 31)—

what if any intention went on in your mind, or the purpose for which you made this transfer of the Pearson District property to this corporation in 1948 and '49? Why did you do it?

He replied (R. 31) :

We wanted to keep it in one piece, and we thought probably the boys would farm it more successfully if they had an interest in it.

Similarly, John F. Heringer, another of the taxpayers, stated as his reason for transferring the property (R. 38) :

Well, I thought that we needed the boys' help, and was trying to retain it.³

The foregoing, which comprises all of the oral testimony with respect to intent and consideration, reveals no consideration flowing to the taxpayers, either from the corporation or from the non-contributing stockholders. The latter did not contractually obligate themselves, because of the transfers, to remain in the business of farming or to do anything that they were not otherwise obligated to do. At the most, the oral testimony merely demonstrates that there was a *business reason* for the transfers, and the same may be said with respect to the documentary evidence upon which the taxpayers rely—

³ Frederick J. Heringer, one of the non-contributing stockholders, was asked by counsel for the taxpayers (R. 65) :

When you received an increase in value of your shares by virtue of the contribution of capital to the corporation by the four senior Heringers, did you regard it as something that you received for nothing?

The Tax Court sustained an objection to the question on the ground that it stated facts not of record in the proceeding.

in the main, the explanation in the corporate records that (R. 87) “the effect of the contribution[s] would be to benefit the 11 non-contributing shareholders to the extent of their proportionate interests in the corporation.” But this explanation appears far more consistent with the hypothesis of gift than of consideration, since it merely reflects the expectation that as a result of the transfers, the non-contributing stockholders would become more firmly dedicated to the farming enterprise to the mutual benefit of all concerned. But, as one author has stated (II Paul, Federal Estate and Gift Taxation, Sec. 16.06) “the concept [of gift] has in many cases been identified with transfers not supported by consideration, where *reasons of business* were involved.” (Emphasis added.) Thus, in *Helvering v. Amer. Dental Co.*, 318 U.S. 322, 331, where a cancellation of indebtedness was held to constitute a gift to the debtor, the Supreme Court stated:

The fact that the *motives* * * * *were those of business* or even selfish * * * is not significant. The forgiveness was gratuitous, a release of something * * * for nothing, and sufficient to make the cancellation here gifts within the statute. (Emphasis added.)

Whether a transfer constitutes a gift is a purely factual issue, as this Court has observed in *Pacific Magnesium, Inc. v. Westover*, 183 F. 2d 584. See also *Commissioner v. Jacobson*, 336 U.S. 28, 51. Contrary to the taxpayers’ contention (Br. 21), the record in this case demonstrates the existence of all the elements which would qualify the transfers as valid gifts. There were competent donors, a proper subject matter, a donative

intent (or the absence of adequate consideration in money or money's worth), the delivery of the acreage to a competent donee, the absence of any power in the taxpayer-donors to revoke or repossess it or to exercise any dominion or control over it (except indirectly, as minority stockholders), and acceptance of the acreage by the donee-corporation. II Montgomery's Federal Taxes, Corporations, and Partnerships (1951-52), pp. 965-966. Thus, it cannot be said that the Tax Court's conclusion that the transfers were gifts—regardless of the identity of the donees—was clearly erroneous, and it should therefore be sustained. Rule 52(a), Federal Rules of Civil Procedure; *United States v. Gypsum Co.*, 333 U.S. 364, 394-395, rehearing denied, 333 U.S. 869. Furthermore, the Tax Court's conclusion that the transfers here were gifts accords with the intent of Congress to use the term "gifts" in the broadest and most comprehensive sense. *Commissioner v. Wemyss*, *supra*, p. 306; *Smith v. Shaughnessy*, 318 U.S. 176, 180; *Commissioner v. Beck's Estate*, 129 F. 2d 243, 344 (C.A. 2d). Finally, it is significant that the summation of the taxpayers' argument (Br. 20-24) goes far toward conceding that the transfers *were gifts* albeit alleged gifts to the non-contributing stockholders.

In *Thompson v. Commissioner*, 42 B.T.A. 121, upon facts similar to those of the instant case, the taxpayer, a 50 per cent stockholder in a corporation in which the remaining stock was held by or on behalf of his wife and children, claimed, among other things, that certain transfers of cash and securities which he made to the corporation were contributions of paid-in surplus and not gifts. In holding that the transfers were gifts, the

Board stated, in language appropriate to the instant case (pp. 122-123):

We see no reason in the language of the statute for holding that the petitioner's voluntary contribution to the corporation for which he received nothing, albeit the value of his shares was *pro tanto* enhanced, may be regarded as other than a gift. *Bothin Real Estate Co. v. Commissioner*, 90 Fed. (2d) 91; *King v. United States*, 10 Fed. Supp. 206; *affd.*, 79 Fed. (2d) 453; *Commissioner v. Rosenbloom Finance Corporation*, 66 Fed. (2d) 556; *certiorari denied*, 290 U.S. 692; *Willputte Coke Oven Corporation*, 35 B.T.A. 298. This is no less so because in the corporation's accounting parlance the gift may have been regarded as paid-in surplus, *Bothin Real Estate Co. v. Commissioner, supra*; *Southern Pacific Co. v. Edwards*, 57 Fed. (2d) 891, or because the petitioner and the other shareholders derived benefit in the extent to which the augmentation of the corporation assets is reflected in the value of their shares, *Bothin Real Estate Co. v. Commissioner, supra*; *Southern Pacific Co. v. Edwards, supra*.

Cf. *Scanlon v. Commissioner*, 42 B.T.A. 997, relied upon by the taxpayers. (Br. 22.) There it was held that the transfer of property to a corporation by its sole stockholder was not a gift to the corporation. The decision (as we shall observe more fully below) is in possible conflict with the underlying rationale of this Court's opinion in *Bothin Real Estate Co. v. Commissioner*, 90 F. 2d 91, and with *Commissioner v. Rosenbloom Finance Corp.*, 66 F. 2d 556, *certiorari denied*,

290 U.S. 692. Furthermore, the Board in the *Scanlon* case was careful to except from the scope of its decision the type of situation in the *Thompson* case (and therefore in the instant case), stating (pp. 999-1000):

If petitioner were not the sole shareholder a different question would arise. For other shareholders would benefit proportionately from the receipt of the property by the corporation. As to them, particularly members of the transferor's family, there is no reason to disregard the gift theory. *And if to that extent the transfer is a gift there may be no practical method of administering the act save to treat the tax as applying to the whole.* *Frank B. Thompson*, 42 B.T.A. 121. But no difficulty need disturb us here, since no one but petitioner was interested in either the property transferred or its recipient. (Emphasis supplied.)

And in *Thompson v. Commissioner*, decided April 2, 1941 (1941 P-H T. C. Memorandum Decisions, par. 41,208)—involving the same taxpayer and the same issues, but the two years subsequent to the taxable period in litigation in the first *Thompson* case, *supra*—the Board, in deciding those issues consistently with its opinion in the first *Thompson* case, explicitly stated with respect to the intervening *Scanlon* case:

In that opinion we did not overrule the *Frank B. Thompson* case. Our opinion in that case is dispositive of the questions here presented.⁴

⁴ The two *Thompson* cases were appealed and were disposed of by remands, on February 4, 1942 (C.A. 6th) (30 A.F.T.R.), for action consistent with agreements in compromise entered into by the taxpayer and the Commissioner during the pendency of the appeals.

The taxpayers' reliance upon *Collins v. Commissioner*, 1 T. C. 605 (Br. 18), is similarly misplaced. There, in holding that no taxable gift to a corporation resulted from the waiver by its sole preferred stockholder to undeclared dividends in arrear, the Board, expressly contrasting the first *Thompson* case, called attention to the fact that no transfer was involved, since (p. 609) "The 'waiver' was of something not yet done which might never be done."

II

The Transfers Were Gifts to the Corporation Entitling the Taxpayer-Donors to Only One Exclusion for Each Taxable Year

Vorden Farms, Inc., was organized to conduct a farming and agricultural business. It leased the acreage in question to the Vorden Farms partnership. The rent which it received was the source of dividend distributions to the taxpayers and the non-contributing stockholders. There is no suggestion in the record that the corporation did not serve a business purpose, or that it was not doing business. On the contrary, the corporate form of doing business was deliberately employed here to procure the maximum advantage for the taxpayers and the non-contributing stockholders, and they did not regard the corporation as an empty shell. Thus, Stephen F. Heringer, one of the taxpayers, affirmed his understanding that the corporation carried on "business." (R. 34.) Genette Heringer Whisenhunt, a non-contributing stockholder and secretary-treasurer of the corporation, testified that the proceedings at the annual meetings were not "cut and dried." (R. 45.) Frederick J. Heringer, a non-contributing

stockholder and director, testified that at the annual meetings (R. 63):

We take care of the business which you would normally have in any organization pertaining to the business that we are interested in, such as leases, setting up the dividends, amount of the dividends, and discuss rentals, and so forth.

Donald S. Heringer, also a non-contributing stockholder testified that there were "good organization meetings" and that there were "regular discussions on all topics concerning our business." It is apparent that the corporation was engaged in business activity. Cf. *Kettleman Hills R. S. No. 1 v. Commissioner*, 116 F. 2d 382 (C. A. 9th), certiorari denied, 333 U. S. 582; *Porter Royalty Pool v. Commissioner*, 165 F. 2d 933, 936 (C. A. 6th), certiorari denied, 334 U. S. 83; *Paymer v. Commissioner*, 150 F. 2d 334 (C. A. 2d); *Main-Hammond Land Trust v. Commissioner*, 200 F. 2d 308 (C. A. 6th).

As the taxpayers concede (Br. 15), acceptance of their position—that if the transfers were gifts at all they were gifts to the non-contributing stockholders—requires ignoring the corporation as a separate and distinct legal entity. But in the circumstances of this case the corporate entity may not be disregarded. The taxpayers and the non-contributing stockholders were of course free to choose any form of enterprise for the conduct of their affairs, but having elected to do business as a corporation, they must accept the attendant tax disadvantages. *Higgins v. Smith*, 308 U. S. 473, 477. As observed in *Moline Properties v. Commissioner*, 319 U. S. 436, 438-439:

The doctrine of corporate entity fills a useful purpose in business life. Whether the purpose be

to gain an advantage under the law of the state of incorporation or to avoid or to comply with the demands of creditors or to serve the creator's personal or undisclosed convenience, so long as that purpose is the equivalent of business activity or is followed by the carrying on of business by the corporation, the corporation remains a separate taxable entity.

See also *Diebold v. Commissioner*, 194 F. 2d 266, 270 (C. A. 3d); *Watson v. Commissioner*, 124 F. 2d 437 (C. A. 2d); *National Carbide Corp. v. Commissioner*, 336 U. S. 422; *Interstate Transit Lines v. Commissioner*, 319 U. S. 590; *Commissioner v. Court Holding Co.*, 324 U. S. 311; *Porter Royalty Pool Co. v. Commissioner*, *supra*; *Barber v. United States*, 215 F. 2d 663, 667 (C. A. 8th); *Railway Express Agency v. Commissioner*, 169 F. 2d 193, 195 (C. A. 2d); *Kaufman v. Commissioner*, 175 F. 2d 28 (C. A. 3d). As one authority (Cleary, *The Corporate Entity in Tax Cases*, 1 *Tax L. Rev.* 3, 11, 21 (1945-1946)) has stated,⁵ the general rule, especially with respect to cases in which the *taxpayers* seek to ignore the corporate entity, is that the corporate entity will not be ignored; the resulting tax disadvantages must be accepted where the taxpayer chooses to do business in corporate form to gain some advantage; and where that form is employed—

It is difficult, if not impossible, for the taxpayer to compel the Commissioner to ignore corporate entities * * *. Certainly, if a corporation holds

⁵ See also, by the same writer, *Use of Subsidiary as an Agent after the National Carbide Corporation Case*, Eighth Annual N.Y.U. Institute on Federal Taxation (1950), p. 48.

property or conducts business or transactions for its own account, the Commissioner can levy taxes on that basis, no matter what the taxpayer's motives for choosing the corporate form may have been or how informally the corporate affairs may be conducted.

There may, of course, be situations in which the corporate entity will be disregarded for tax purposes, where the taxpayer seeks to do so. But, as stated in *Munson S. S. Line v. Commissioner*, 77 F. 2d 849, 851 (C. A. 2d) that would require the existence of "exceptional circumstances", which are not present in the instant case. See also *New Colonial Co. v. Helvering*, 292 U. S. 435, and *Burnet v. Commonwealth Imp. Co.*, 287 U. S. 415.

In *Thompson v. Commissioner*, *supra*, the donor-taxpayer-50 percent stockholder attempted—as the taxpayers here—to (p. 122) "leap over the legal existence and ownership of the corporation". It was held, however, that the transfers were gifts to the corporation, since, as is equally applicable here, (p. 123) :

The corporation is, as the statute expressly says, a "person" * * * and a taxpayer. As such, it is in law separate from the petitioner * * *. It is the donee of petitioner's contributions and the owner thereof in its own right. If it sells the property, the resulting gain or loss comes to it and not to its shareholders * * *. The measure thereof is calculable upon the basis which would have been applicable to the donor * * *. If the donor remains a shareholder of the corporation, his death will result in the testamentary transfer not of the corporation's property but of the petitioner's

shares in the corporation, which, as gross estate, will measure the estate tax.

The decisions of this and of other courts of appeals—in cases involving the determination of the basis of transferred property in order to fix liability for income tax purposes—support the decisions below that the transfers were gifts to the corporation, and not to the non-contributing stockholders. The relevance of those cases to the instant situation stems from their underlying premise that the *transfers of property there made to corporations (by sole or majority stockholders) constituted gifts to the corporations, and not to the stockholders*. In *Bothin Real Estate Co. v. Commissioner, supra*, the transferor, who was the sole stockholder of the taxpayer corporation, in 1923 transferred to the taxpayer shares of stock in another corporation. The taxpayer sold part of that stock in 1927, and in 1928 it received approximately \$450,000 in cash in liquidation of the remaining stock. With respect to the gain on the liquidation and disposition of the shares, the taxpayer contended that since the transferor was the taxpayer's sole stockholder, any increase in its net worth by reason of the transfer would (as the taxpayers contend in the instant case) be reflected in the book value of his shares of stock; that the enhancement of his shares constituted an adequate consideration for the transfer, foreclosing treatment of the transfer as a gift; that the taxpayer's basis for determining gain was therefore the fair market value of the property at the time of the transfer. This Court, however, held that the transfer was a gift to the corporation (cf. *Scanlon v. Commissioner, supra*), thus requiring the use of the cost of the transferred property to the transferor as the basis for determining the tax-

payer's gain or loss. In *Weeks v. White*, 77 F. 2d 817 (C. A. 1st), the taxpayer's father organized a corporation in 1919, with the primary purpose of preserving a homestead for the benefit of his heirs. To prevent the homestead from becoming a burden to them, he transferred to the corporation certain securities to insure the upkeep of the property and to meet operating expenses. The father originally owned all but two shares of the stock. However, in 1919, he gave all of the stock to his son (the taxpayer) and to his daughter. In 1928, the corporation paid a dividend in partial liquidation of its capital. In computing his income tax liability for 1928, the taxpayer considered—as part of the cost basis of the stock given to him by his father in 1919—an allocate portion of the cost to his father of the securities which the father had transferred to the corporation. The taxpayer's position rested on the theory that the father's contributions constituted gifts to himself and to his sister, and that he was therefore entitled to use the basis in the hands of the donor at the time the alleged gifts were made. The court disagreed. In language appropriate to the instant case, it said that although the father's contributions were undoubtedly in furtherance of his original purpose, as aforementioned, nevertheless (p. 820):

If his purpose had been simply to make gifts to his children, there is *nothing to indicate that he would not have done so directly rather than indirectly through the corporation.* * * * the intent of the donor must be the determining factor. Contributions to a corporation cannot be held as a matter of law to be gifts to the shareholders because they may ultimately be beneficially affected. The entity

of the corporation created by the rather * * * for a definite purpose may not be disregarded. (Emphasis added.)

In *Forrestal, Trustee v. Commissioner*, 41 B. T. A. 1080, James Forrestal organized a personal holding company (Beekman) in 1928, all of the stock of which was issued to him. The taxpayer-trust was created in 1929, and 30 shares of the corporation's stock were transferred to it. In 1932, Forrestal transferred stock of Dillon, Read & Company to the corporation as paid-in surplus. In 1934, Forrestal sold the remaining shares of the corporation to the trust. The corporation was dissolved in 1934. The question was whether Forrestal's contribution to the corporation's paid-in surplus (at a time when he owned only 70 shares of Beekman) served to increase the cost basis of the trust with respect to the 30 shares of Beekman which it owned at that time. The Board, holding that there was no such increase in the taxpayer's basis *because the 1932 transfer was a gift to the corporation*, stated (pp. 1081-1082) :

It does not follow * * * that any portion of the cost of the Dillon-Read shares should be added to the petitioner's basis for gain or loss on its 30 shares of Beekman stock. Forrestal could have contributed some of the Dillon-Read shares directly to the petitioner and the petitioner could have increased its basis on the Beekman shares in turn by contributing the Dillon-Read shares to Beekman. But that was not done. "Contributions to a corporation can not be held as a matter of law to be gifts to the shareholders because they may ultimately be beneficially affected." *Weeks v. White*, 77 Fed. (2d) 817.

See also *Commissioner v. Rosenbloom Finance Corp.*, *supra*, and *Wilputte Coke Oven Corp. v. Commissioner*, 35 B. T. A. 298, 302-303.

The example in the committee report upon which the taxpayers rely (Br. 17) is not controlling here, and, as the taxpayers themselves have noted (Br. 18), it was not incorporated in later regulations. On its face, a transfer by A to a corporation owned *exclusively* by his children is different from a situation where, as here, A, in effect, has transferred property to a corporation in which his children own 60 per cent of the stock, and he owns the remaining 40 per cent. Cf. *Scanlon v. Commissioner*, *supra*, p. 999. In the committee's illustration, evidence of an intent to make a gift to the children is easily spelled out from the fact that the taxpayer has completely divested himself of all control over, and interest in, the property. The same is not true here, where, after the transfers, the taxpayers still retain a very substantial interest in the corporation. In this circumstance, the question of fact persists—whether the taxpayer-donors intended to make a gift to the corporation, or, *pro rata*, to the non-contributing stockholders—and this was a question for resolution by the trier of the facts. *Wilmington Trust Co. v. Helvering*, 316 U. S. 164, 168.

If, as the Tax Court held, the corporation in the instant case was the entity to which the gifts were made, it is clear that the donor-taxpayers are entitled to only one exclusion for each of the years involved. Section 1003(b)(3) of the Internal Revenue Code of 1939, *supra*, applicable to 1948 and 1949, provides that in the case of gifts (other than gifts of future interests in property) made to any persons, the first \$3,000 of such

gifts to such person shall not be included, in computing the tax laid upon net gifts made during the year. Section 3797(a)(1) of the 1939 Code, *supra*, plainly defines the term "person" as meaning, among other things, a corporation. Furthermore, even if we assume, without conceding, that the taxpayers in fact intended to make gifts to the non-contributing stockholders, and not to the corporation, they would have been gifts of future interests, and no exclusions would have been allowed. Section 86.11, Treasury Regulations 108, defines a "future interest" to include, among other things, an interest which is limited to commence in use, possession, or enjoyment, at some future date or time. See *United States v. Pelzer*, 312 U. S. 399; *Ryerson v. United States*, 312 U. S. 405; and *Helvering v. Hutchings*, 312 U. S. 393. The term "future interest" is not limited to its meaning in the law of property. As stated in *Commissioner v. Wells*, 132 F. 2d 405, 407 (C. A. 6th):

In considering this question, it is necessary to put aside conceptions of "estates in future" as understood by Blackstone and the classic commentators on the common law. For future estates, as the term is used in the statute, are not to be understood as interests similarly designated in the law of conveying. They are, rather, interests in land or other things, in which the privilege of possession or of enjoyment is future and not present * * *.

And as this Court observed in *Fisher v. Commissioner*, 132 F. 2d 383, 385:

The Treasury Regulations and committee reports concerned * * * merely declare that possession or enjoyment must commence in the future.

See also *Hutchings v. Commissioner*, 1 T. C. 692.

The non-contributing stockholders did not have the present right to the use, possession or enjoyment of the properties transferred to the corporation by the taxpayers. Full ownership and control of the acreage contributed by the taxpayers was in the corporation. True, the non-contributing stockholders were entitled to receive dividends from corporate earnings derived from the rents which they, as partners of Vorden Farms, paid to the corporation, and they could expect to receive part of the assets of the corporation when and if there was a distribution in liquidation. But these were obviously interests limited to commence in use, possession, or enjoyment at some future date or time, and were therefore future interests within the meaning of Section 1003(b).

The taxpayers' reliance upon *Helvering v. Hutchings, supra*, is misplaced. That case involved a trust for the benefit of the taxpayer's children. True, in holding that the number of exclusions for gift tax purposes was there controlled by the number of the beneficiaries, the Supreme Court stated (p. 396):

A gift to a trustee reserving to the donor the economic benefit of the trust or the power of its disposition, involves no taxable gift. It is only upon the surrender by the donor of the benefit or power reserved to himself that a taxable gift occurs, *Estate of Sanford v. Commissioner*, 308 U. S. 39; *Rasquin v. Humphreys*, 308 U. S. 54, and it would seem to follow that the beneficiary of the trust to whose benefit the surrender inures, whether made at the time the trust is created or later, is the "person" or "individual" to whom the gift is made.

Significantly, however, the Court explained (p. 36) that in common understanding and usage of language "One does not speak of making a gift to a trust rather than to his children who are its beneficiaries." By way of contrast, however, the concept of a corporation as a separate entity, distinct from its stockholders and in complete control of the property in which it is vested with full legal and equitable title, is firmly entrenched in our jurisprudence. Consequently, as observed in *Thompson, supra*, p. 124, "the very doubt which [before *Hutchings*] * * * affected the question as to trusts strengthens the conclusions that a gift to a corporation may not be treated as a group of gifts to its shareholders." As we have already noted, the corporation here was not a sham, and it may not be disregarded. The taxpayers' surrender of benefit and power with respect to the acreage here involved was to the corporation, as such, and not to the non-contributing shareholders. Furthermore, even if it is assumed, *arguendo*, that *Hutchings* supports the view that a gift to a corporation is a gift to its stockholders, the gifts must be of present interests. *Hutchings* explicitly avoided any consideration of the question whether the gifts to the trust beneficiaries there were of future interests, since that question was "not presented by the petition for certiorari." (P. 398) In the instant case, as we have said above, if the transfers were gifts to the non-contributing stockholders, they were gifts of future interests.

III

The Value of the Gifts Was the Full Value of the Acreage Conveyed

On the hypothesis that the transfers of the property were gifts to the corporation, the taxpayers divested

themselves, in favor of the corporation, of full ownership and control over the acreage (except such control as any minority stockholders would have with respect to any property indisputably owned by the corporation and even derived by it from a source other than its stockholders). It follows, then, that the value of the gifts to the corporation was the full measure of its value in the hands of the transferors. This is no less so because the taxpayers "derived benefit in the extent to which the augmentation of the corporation assets is reflected in the value of their shares." *Thompson v. Commissioner, supra*, p. 123. See also *Bothin Real Estate Co. v. Commissioner, supra*; *Weeks v. White, supra*, p. 820. The taxpayers' argument to the contrary is valid, admittedly, only on the assumption that the corporation is to be regarded as nothing more than a mere (Br. 21) "mechanical vehicle to effect the transfer of only 60% of the value of the land to the eleven individual shareholders." But Vorden Farms, Inc., was a bona fide corporation voluntarily organized as a suitable means of doing business and accomplishing the ends sought by the taxpayers and the non-contributing shareholders. Nothing in the record suggests that the taxpayers could not have conveyed 60 percent of the acreage directly to the eleven children. Cf. *Weeks v. White, supra*, p. 820. But that was not done, and a taxpayer does not escape tax liability on a taxable transaction merely because he might have chosen a non-taxable method. As stated in *Founders General Co. v. Hoey*, 300 U. S. 268, 275:

It is suggested that * * * the taxpayer might have attained his ultimate purpose by a form of transaction which would not have subjected him to

the tax. The suggestion, if true, furnishes no reason for relieving him of tax when, for whatever reason, he chooses a mode of dealing within the terms of the Act. * * * To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty.

CONCLUSION

The decisions of the Tax Court are correct and should be affirmed.

Respectfully submitted,

H. BRIAN HOLLAND,

Assistant Attorney General.

ROBERT N. ANDERSON,

A. F. PRESCOTT,

MEYER ROTHWACKS,

Attorneys,

Department of Justice,

Washington 25, D. C.

DECEMBER, 1955.

No. 14,574

IN THE

United States Court of Appeals
For the Ninth Circuit

STEPHEN F. HERINGER, MABEL H. HER-
INGER, JOHN F. HERINGER, and ALTA
G. HERINGER,

Petitioners,

VS.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the
Tax Court of the United States.

PETITION FOR REHEARING.

R. E. H. JULIEN,

220 Bush Street, San Francisco 4, California,

Attorney for Petitioners.

FILED

JUN 29 1956

PAUL P. O'BRIEN, CLERK

Table of Authorities Cited

Cases	Pages
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MacDermot v. Hayes, 175 Cal. 95, 170 Pac. 616.....	6

Codes

1939 Internal Revenue Code, Section 1003 (b)	2, 4
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No. 14,574

IN THE

**United States Court of Appeals
For the Ninth Circuit**

STEPHEN F. HERINGER, MABEL H. HER-
INGER, JOHN F. HERINGER, and ALTA
G. HERINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Petition for Review of the Decision of the
Tax Court of the United States.

PETITION FOR REHEARING.

*To the Honorable William E. Orr and Richard H.
Chambers, Circuit Judges, and William C. Mathes,
District Judge.*

Petitioners respectfully request you grant a rehear-
ing on your decision of June 7, 1956.

Our request is founded entirely upon the sincere be-
lief that it is your desire to have afforded each party
a full and fair hearing on all of the issues adjudicated,
and to make as complete a disposition of those issues
in these particular cases as is possible at the present
time.

Specifically, we believe the oral argument of March 14, 1956 was, in no manner addressed by either counsel for the respondent or counsel for the petitioners to the issue or question of whether there were gifts of "future interests" as applied to the facts of the instant cases, under Section 1003 (b), 1939 I.R.C. (Op. pp. 4-5.) Nor do we recall that any one of the Judges of this Court, as constituted in the original hearing on March 14th, directed any inquiry to either counsel on this major point upon which your existing decision is partially predicated.

It is understandable and natural that this question or issue was not in focus or considered at the March 14th hearing, since the Tax Court made no reference to, nor finding of fact upon, nor decision upon it. Nor does the record before this Court indicate, in any statement of points to be relied upon by counsel for either party, that the "* * * interests taken by said children were 'future interests' within the meaning of the statute * * *" (Op. p. 4) which results in your decision of June 7th denying the \$3,000 annual exclusion to each donor for each of the eleven children. It is true, that the respondent utilized in a catchall argument of a little over a page of his brief, at page 22, his generalized postulate that the "* * * gifts to the non-contributing stockholders (children), * * * would have been gifts of future interests, * * *". (If gifts to the children and not to the corporation had in fact been made.) But it is equally true that, throughout the record and oral arguments before this Court on March 14th, there was no responsive attention given to this

then apparently abandoned and, as here applicable, factually remote point. We believe that to permit your decision to stand on the present state of the record will effect an unnecessary injustice upon these petitions. Moreover, although your present opinion indicates (Op. at p. 4, and again at p. 5), that the children are the real beneficiaries or donees of these gifts, the absence of a square decision upon that crucial point will undoubtedly provoke further controversy with the government, not only by these petitioners but other taxpayers, who are awaiting your decision, as well. Your failure to decide who are the real donees point will create other problems, such as: What will be the *basis of these donors* stock; and what will be the *basis of the noncontributing shareholders* stock on a sale or other income tax realization by any of them?

So, in all humility, both as counsel for petitioners and as an officer of this honorable Court, we respectfully ask for a hearing or rehearing to brief the major point of: Whether an unfettered owner of a share or shares of common capital stock of a California corporation (the children here) is the beneficial owner of a "future interest" *under any provision of the federal gift tax statute*, any proper treasury regulation issued in pursuance thereof, or any appropriate court decision?

Realistically viewed, the petitioners' cases are clearly distinguishable, on their facts, from all of the court decisions relating to the so-called trust conditions or limitations which inveigh against certain donees having the "* * *" present power of possession and en-

joyment of the gift.” Petitioners counsel has carefully reexamined all of the cited cases in these proceedings, as well as carried on further extensive legal research in this matter, with the sincere conviction that on this point they are not applicable to the Heringers’ cases. All of those other cases show the donee has a future interest because of the required “joint action” of either another donee as well as himself, or the trustee as well as himself, or there is a clear postponement of his right to either or both the income and principal of the subject matter of the gift. In short, in all of the cited cases the donee may never come into possession and enjoyment let alone have a “present power” to bring about such possession and enjoyment, as here. Those cases are therefore very wide of the mark in these Heringer matters.

Basically, the “* * * present power of possession and enjoyment of the gift, * * *” (Op. p. 4) in the hands of the Heringers’ children is best and most forcefully seen in their individual and unconditional power to individually and presently realize upon their individual aliquot capital interest in the assets of Vorden Farms corporation (the real measure and real subject matter of the gifts here) *by sale of their individual stock—right now!* In these circumstances it is difficult to see how one could reasonably substantiate the proposition that an outright gift of common capital stock, without any strings attached or “joint action” of anyone, is the gift of a “future interest” under section 1003 (b) or under any other applicable provision of the Internal Revenue Code relating to the

taxation gifts, *qua gifts*. Yet, is not that essentially what the respondent is asking the courts to rule in these cases at bar?

Each of the several children of the Heringers have just as much of a "present power of possession and enjoyment" of the principal and income of 60% of the stock of Vorden Farms, Inc. which they each individually own outright as do their parents who similarly own the other 40%! There are here no trust limitations or strings attached as clearly appear on the facts and as lucidly shown in the opinion of Mr. Justice Stone, who wrote all three, in the Hutchings, Ryerson and Pelzer decisions of the Supreme Court. (Your, Op. 4.) A careful reexamination of those opinions leave little doubt as to how Mr. Justice Stone would have distinguished them from the cases at bar. Cf., *A. Gregory v. The State of California*, 77 Cal. App. (2d) 26, 174 Pac. (2d) 863. Neither does the *Wells case* (Op. 4), which provided that the amount of *income and principal* to be distributed to the beneficiaries *should rest entirely in the discretion of the trustees*, come even close on the facts here. Nor does the opinion in the *Skouras case* (Op 5.) apply for there the "joint action" of the *other joint assignee* was necessary to the destruction of the joint interest in the assigned policy. Compare, *S. R. Baer*, 2 TCM 285, where, as here pertinent, the Tax Court held that the irrevocable assignments of life insurance directly to a single beneficiary are gifts of present interests. Thus, in these Heringers cases, each child stockholder individually owns his or her stock outright. There are no

trust conditions or joint action restrictions on any of these stockholders *present power* or right to principal (by sale of their stock) or income (dividends, like any other shareholder.) Stockholders so situated clearly have *present interests under the gift tax law*. To hold otherwise would distort and be disruptive of the plain understanding of every American owning a share of stock. On the nature of a stockholders interest under California law, see, *MacDermot v. Hayes*, 175 Cal. 95, at 114, 170 Pac. 616; *W. F. Boardman Co. v. Petch*, 186 Cal. 476, 199 Pac. 1047.

Certainly, no one could rationally suggest that the donor-parents have only a "future interest" in the 40% of the stock of Vorden Farms, Inc. which they each individually and severally own. *How then can each of the eleven individuals and adult children, who are in precisely the same position of severalty of ownership, be treated differently?*

Indeed, the Record discloses that the whole generic idea of these petitioners, their factual intentions, and their executed transactions, as recognized by a partial holding of this Court, point to what we believe is the inexorable conclusion that the non-contributing shareholders or children (as Congress intended) are the real donees of present and not future interests. The record also shows that, because of these circumstances, the *basis* for the children's stock is the same value per share as is the basis of the stock in the hands of the parents. To hold otherwise would be an inequitable distortion of the facts in the record.

We shall be happy, without further belaboring this Court here or at this time to submit orally or in written memorandum form what we believe are additionally helpful, pertinent, and convincing authorities to support the foregoing views.

Dated, San Francisco, California,
June 29, 1956.

Respectfully submitted,
R. E. H. JULIEN,
Attorney for Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that in my judgment the within petition for rehearing is well founded and is not interposed for delay.

R. E. H. JULIEN,
Attorney for Petitioners.

No. 14575

United States
Court of Appeals
for the Ninth Circuit

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division.

FILED

JAN 11 1955

PAUL P. O'BRIEN,

No. 14575

United States
Court of Appeals
for the Ninth Circuit

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

Transcript of Record

**Appeal from the United States District Court for the
Southern District of California,
Central Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
MARVIN ZINMAN,
Assistants U. S. Attorney,
600 Federal Bldg.,
Los Angeles 12, Calif.

For Appellee:

GIRARD F. BAKER,
JOHN W. ERPELDING,
916 Walter P. Story Bldg.,
610 S. Broadway,
Los Angeles 14, Calif.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 16010 T

RALPH B. THORBUS,

Plaintiff,

vs.

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Defendant.

COMPLAINT FOR REVIEW OF DECISION
OF DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE UNDER SOCIAL
SECURITY ACT

The plaintiff, Ralph B. Thorbus, respectfully
represents to the Court as follows:

I.

That he is a citizen of the United States of America, residing in the County of Los Angeles, State of California.

II.

That this proceeding is brought to review the decision of Referee John L. Landfair of the Department of Health, Education and Welfare, Social Security Administration, on the claim of Ralph B. Thorbus for old-age insurance benefits under the Social Security Act as amended. [2*]

*Page numbering appearing at foot of page of original Certified Transcript of Record.

III.

That the plaintiff was a self-employed person as defined under provisions of the United States Code, Title 42, Sec. 411 (Sec. 211 of Social Security Act), as amended in 1950, and that plaintiff paid in good faith during the years 1951 and 1952 the employment tax required pursuant to the provisions of the Internal Revenue Code as set forth in Instruction 5, Schedule C, of Income Tax Form 1040, to wit: For the year 1951 on \$3,600.00 of his taxable income of \$4,592.42 the sum of \$81.00, and for the year 1952 on \$3,600.00 of his taxable income of \$3,993.46 the sum of \$81.00, which said payments were made to the office of the Director of Internal Revenue, Los Angeles, California.

IV.

That plaintiff during the years 1951 and 1952, and for many years prior thereto, leased from the owner thereof, The First Methodist Church of Los Angeles, certain real estate consisting of a lot and an unfurnished 72-room building thereon, and paid to the said owner of said real estate the full rental value of said real estate; that the said rental paid to said owner was listed by plaintiff as, and deducted as, an operating expense on Schedule C of Form 1040 of the Department of Internal Revenue filed with the Director of Internal Revenue in Los Angeles for the aforesaid years on or before March 15, 1952, and on or before March 15, 1953, respectively, in determining plaintiff's taxable income; that no part of plaintiff's taxable income which

is the basis of plaintiff's claim was derived from rental of real estate and the whole thereof was derived from services furnished by him to his guests in rooms and apartments furnished, maintained and serviced by him.

V.

That plaintiff serviced the 72 rooms in said building and supplied hotel-like services to the guests; that in addition to [3] supplying heat, light and janitorial service, plaintiff rendered additional services, some of which were as follows:

1. Plaintiff was on duty in said building on a 24-hour-a-day basis, and in addition he provided a manager and desk clerk who worked on a full-time basis and on whose salary plaintiff paid Social Security and other taxes, and whose duties included taking care of the various needs of the tenants, as is the custom of such an employee in a hotel, including, among other things, receiving and sorting mail, taking messages for guests and telephone service;

2. He supplied linen such as sheets, pillow cases and towels for the guests and provided for laundering of same. Plaintiff made a charge for the laundering, the receipts from which were declared and included as part of the income upon which his claim is based;

3. Plaintiff provided telephones on each of the floors of the building and the manager or he himself would answer the telephone calls and call the guests to the telephone by means of a buzzer system. Telephone calls to which the plaintiff or the man-

ager would call guests on some days numbered as many as 100;

4. He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests;

5. He provided gas, cooking stoves and paid all the utilities charges in connection with the use of same;

6. He provided all the repairs and other work necessary for the convenient occupancy of and upkeep of the rooms or facilities occupied by the guests;

7. He provided complete laundry facilities for all guests, including tubs, clotheslines and electric irons; [4]

8. He supplied dishes and cooking utensils and utilities for all guests;

9. He provided for the sorting and placing of guests' mail in individual mail boxes.

That most of the guests paid their bills on a weekly basis, a few, however, on a daily basis, and a few on a monthly basis.

VI.

Account No. 548-24-2990 was issued to plaintiff and the payments made under the provisions of the Social Security Act as amended were carried for the benefit of plaintiff under the aforementioned Act under said number.

VII.

That plaintiff is over the age of sixty-five (65) years. That said owner of said real estate sold the same and plaintiff's lease was terminated and his operations closed in January, 1953.

VIII.

That on February 25, 1953, plaintiff filed with the Department of Health, Education and Welfare, Social Security Administration, an application for old-age insurance benefits under the Social Security Act as amended, which application was disallowed on July 9, 1953, pursuant to a decision of Referee John L. Landfair of the Department of Health, Education and Welfare, Social Security Administration, and further disallowed by the Appeals Council of said Department of Health, Education and Welfare, which notified plaintiff that his request for review was denied, said notice being dated September 22, 1953.

IX.

That attached hereto and made a part hereof as Exhibits "A" and "B," respectively, are copies of the Referee's decision, and the [5] letter advising plaintiff of the denial by the Appeals Council of his request for review thereof, and Denial of Claim for Review.

X.

That as shown by the Referee's opinion, the issue is whether the plaintiff's income was that of a self-employed person as defined under provisions of the U. S. Code, Title 42, Sec. 411 (Sec. 211 of Social

Security Act), as amended in 1950, and under 20 Code of Federal Regulations, Sec. 404.1051, or was a rental from real estate as referred to in subparagraph (a) (1) of the above-referred-to Section of the U. S. Code, Title 42, Sec. 411, as amended in 1950, and as referred to in 20 Code of Federal Regulations, Sec. 404.1052 (a) (3).

XI.

That plaintiff respectfully submits to the Court that no part of his taxable income upon which he paid taxes as a self-employed person was derived from the rental of real estate, and that he was a self-employed person within the meaning and provisions of the Social Security Act and of the Regulations of the Secretary of the Department of Health, Education and Welfare, and that he is entitled to old-age benefits as provided for under said Act.

Wherefore, Plaintiff prays that the Secretary of Health, Education and Welfare, defendant herein, be required to answer this complaint; that the Plaintiff be granted leave to introduce and present evidence; and that the said decision of the Referee may be reviewed, reversed and set aside; that the refusal of the Appeals Council to review said Referee's decision be reversed; and that the claim of plaintiff herein for old-age benefits be allowed; and the Secretary of Health, Education and Welfare be Ordered to make payment of the claim of [6] plain-

tiff; and that the plaintiff may have such other and further relief as to the Court may seem proper.

/s/ RALPH B. THORBUS,

Plaintiff.

/s/ GIRARD F. BAKER,

Attorney for Plaintiff. [7]

EXHIBIT "A"

Department of Health, Education, and Welfare,
Social Security Administration, Office of Ap-
peals Council

Referee's Decision

Case No.: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of

Ralph B. Thorbus (Name of Claimant)

Ralph B. Thorbus (Wage Earner's Name)

548-24-2990 (Social Security Account No.)

The above matter is before the referee on appeal from a determination by the Bureau of Old-Age and Survivors Insurance of the Social Security Administration, Department of Health, Education and Welfare. The claimant, Ralph B. Thorbus, disagreed with the Bureau's determination by filing a request

for a hearing before a referee. After due notice, a hearing was held at Los Angeles, California, on June 10, 1953, before the undersigned referee. The claimant was present and participated in the hearing.

The issue in this matter is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

The Bureau determined that this claimant had no quarters of coverage to meet the term, "a fully insured individual," at the time he filed his application on February 25, 1953. The claimant feels he would have the necessary six quarters of coverage if his net earnings from self-employment derived from rental of apartment units in the years 1951, 1952 and up to January 19, 1953, were considered. It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units, including [8] linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the units and provides utilities to the tenants for definite rentals by the week.

Section 211 (a) of the Social Security Act, as amended in 1950, provides that in computing gross income and deductions for the purposes of deter-

mining net income from self-employment, there shall be excluded:

“* * * rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto, unless such rentals are received in the course of a trade or business as a real estate dealer.”

Regulations No. 4, approved December 18, 1951, in section 404.1052, with respect to the above exclusion, provides as follows:

“404.1052 Income excluded from net earnings from self-employment. For the purpose of computing net earnings from self-employment, the gross income derived by an individual from a trade or business carried on by him, the allowable deductions attributable to such trade or business, and the individual's distributive share of the ordinary net income or ordinary net loss from any trade or business carried on by a partnership of which he is a member shall be computed in accordance with the following special rules:

“(a) Rentals from real estate.

“(1) Rentals from real estate (including personal property leased with the real estate), and the deductions attributable thereto, unless such rentals are received by an individual in the course of a trade or business as a real estate dealer, are [9] excluded. Whether or not an individual is engaged in the trade or business of a real estate dealer is determined by the application of the principles fol-

lowed in respect of the taxes imposed by sections 11 and 12 of the Internal Revenue Code. In general, an individual who is engaged in the business of selling real estate to customers with a view to the gains and profits that may be derived from such sales is a real estate dealer. On the other hand, an individual who merely holds real estate for investment or speculation and receives rentals therefrom is not considered a real estate dealer. Where a real estate dealer holds real estate for investment or speculation in addition to real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, only the rentals from the real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, and the deductions attributable thereto, are included in determining net earnings from self-employment; the rentals from the real estate held for investment or speculation, and the deductions attributable thereto, are excluded.

“(2) Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple housing units are generally rentals from real estate. Except in the case of real estate dealers, such payments are excluded in determining net earnings from self-employment even though such payments are in part attributable to personal property furnished under the lease.

“(3) Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the ‘use or oc-

cupancy' of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing [10] hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant. * * *''

Under the law and regulations it is clear that the rentals received from an apartment house, for either furnished or unfurnished units, ordinarily constitute rental from real estate so that the only question is whether or not services of such a nature are rendered to remove them from that category and, in effect, to place the owner or lessee in the position of running an apartment hotel. Since section 404.1052 (a) (3) of the Regulations No. 4 provides that the furnishing of heat and light, the cleaning of the public entrances, exits, stairways and lobbies, the collection of trash, etc., are not sufficient services in connection with the renting of

rooms in rooming houses, it is the referee's opinion that similar services rendered in connection with an apartment house are likewise insufficient in connection with the renting of apartments in an apartment house, furnished or unfurnished, and that the rentals continue to be excluded as rentals from real estate. The claimant does not allege he is a real estate dealer.

It is the finding of the referee that the claimant needed six [11] quarters of coverage for a fully insured status, he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and up to January 19, 1953, constitute rentals from real estate and thus are excluded as net income from self-employment.

Inasmuch as the claimant did not meet one of the principal requirements for entitlement to old-age insurance benefits, i.e., he was not a fully insured individual, it is the decision of the referee that the claimant is not entitled to the benefits for which he filed application.

Date: July 9, 1953.

/s/ JOHN L. LANDFAIR,
Referee. [12]

EXHIBIT "B"

Department of Health, Education and Welfare,
Social Security Administration, Washington, D. C.

In Reply Refer to File No. 09:AC

September 22, 1953.

Office of Appeals Council

In the case of Ralph B. Thorbus, Claimant and
Wage Earner, Social Security Account No.
548-24-2990.

Mr. Ralph B. Thorbus,
305 W. 8th Street,
Los Angeles, California.

Dear Mr. Thorbus:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claim for old-age insurance benefits. Your Request for Review having been denied, the referee's decision stands as the final administrative decision on your claim.

If you desire a review of the referee's decision by a court, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended. If such an action is filed, Oveta Culp Hobby, Secretary of

Health, Education and Welfare, is the proper defendant.

Sincerely yours,

/s/ JOSEPH E. McELVAIN,
Chairman. [13]

Department of Health, Education, and Welfare,
Social Security Administration, Office of Appeals Council

Denial of Request for Review

Case No.: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of

Ralph B. Thorbus (Claimant)

Ralph B. Thorbus (Wage Earner)

548-24-2990 (Social Security Account No.)

This case is before the Appeals Council upon the request of the claimant for review of the referee's decision, rendered on the 9th day of July, 1953. We are of the opinion that a review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Dated: September 22, 1953.

Duly verified.

[Endorsed]: Filed November 4, 1953. [14]

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now the defendant, Oveta Culp Hobby, Secretary of Health, Education, and Welfare, and for her answer to the plaintiff's Complaint on file herein, admits, denies and alleges as follows:

First Defense

I.

Answering Paragraph I of the Complaint, defendant alleges that she is without knowledge or information sufficient to form a belief as to the truth of the allegations contained therein, and on that ground denies each and every allegation contained therein.

II.

Answering Paragraph II of the Complaint, defendant admits the allegations contained therein. Further answering Paragraph II, defendant alleges that the Appeals Council, Social Security Administration, Department of Health, Education, and Welfare, on September 22, 1953, denied plaintiff's request for review of the decision of Referee John L. Landfair, and that under the regulations and practice of the Social Security Administration, the said Referee's [15] decision thereby became the "final decision" of the Secretary of Health, Education, and Welfare, within the meaning of Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g).

III.

Answering Paragraph III of the Complaint, defendant admits that plaintiff reported on Schedule C of Income Tax Form 1040 that he had taxable income of \$4,592.42 for the year 1951, and \$3,993.46 for the year 1952, and that he reported in his Income Tax Form 1040 for each of those two years an alleged self-employment tax of \$81.00 computed with respect to \$3,600 of alleged self-employment income, and denies each and every other allegation in said paragraph. Further answering said Paragraph III, defendant alleges that plaintiff had no net earnings from self-employment in the years 1951 and 1952.

IV.

Answering Paragraph IV of the Complaint, defendant admits that during the years 1951 and 1952, and for many years prior thereto, plaintiff leased from the First Methodist Church of Los Angeles certain real estate consisting of a lot and an unfurnished 72-room building thereon (except a part of the basement of said building excepted from the lease by the said lessor), and that the rental paid to the said lessor was listed by the plaintiff as, and deducted by him as, an operating expense on Schedule C of Form 1040 of the Department of Internal Revenue, which said form was filed with the Director of Internal Revenue at Los Angeles on or before the dates alleged; and denies each and every other allegation in said paragraph.

V.

Answering Paragraph V of the Complaint, de-

fendant alleges that the plaintiff rented on a weekly basis furnished apartment units in the building leased from the First Methodist Church of Los Angeles, as aforesaid, admits that plaintiff supplied heat, light, and janitorial services, that plaintiff rented linens to certain of the tenants occupying space within said building, and that he effected, or caused to be effected, certain repairs and [16] painting in the premises leased, as aforesaid, and denies each and every other allegation in said paragraph.

VI.

Answering Paragraph VI of the Complaint, defendant admits that plaintiff was issued Social Security Account No. 548-24-2990, and denies each and every other allegation in said paragraph.

VII.

Answering Paragraph VII of the Complaint, defendant admits the allegations contained therein.

VIII.

Answering Paragraph VIII of the Complaint, defendant admits the allegations contained therein. Further answering Paragraph VIII, defendant alleges that prior to the decision of Referee John L. Landfair, described therein, the Bureau of Old Age and Survivors Insurance of the Social Security Administration, on April 1, 1953, made its determination disallowing plaintiff's application for old age benefits; that the hearing and decision of Referee John L. Landfair occurred subsequent to said determination of the Bureau of Old-Age and Sur-

vivors Insurance, and pursuant to plaintiff's request for hearing before a Referee.

IX.

Answering Paragraph IX of the Complaint, defendant admits the allegations contained therein. Further answering said Paragraph IX, defendant alleges that a certified copy of a full and accurate transcript of the entire record of proceedings relating to the claim of plaintiff for old-age insurance benefits under Title II of the Social Security Act, as amended, is attached hereto marked Exhibit "A" and hereby made a part hereof.

X.

Answering Paragraph X of the Complaint, defendant denies the allegations contained [17] therein.

XI.

Answering Paragraph XI of the Complaint, defendant denies the allegations contained therein.

Second Defense

I.

The Complaint fails to state a claim against defendant upon which relief can be granted.

Third Defense

I.

A certified copy of a full and accurate transcript of the entire record of proceedings relating to the

claim of plaintiff for old-age insurance benefits under Title II of the Social Security Act, as amended, is attached hereto marked Exhibit "A" and made a part hereof.

II.

The Bureau of Old Age and Survivors Insurance, Social Security Administration, Federal Security Agency, Referee John L. Landfair of the Social Security Administration, the Appeals Council of the Social Security Administration, and Oveta, Culp Hobby, Secretary, Department of Health, Education, and Welfare, have made findings of fact, supported by substantial evidence, to the effect that plaintiff's income for the period of January 1, 1951, to January 19, 1953, constituted "rentals from real estate (including personal property leased with the real estate)," and that such rentals were not "received in the course of a trade or business as a real estate dealer" and further found that said rentals were not "net earnings from self-employment," as the said terms are defined in the Social Security Act, as amended. [18]

Fourth Defense

This Honorable Court has no jurisdiction to grant any of the relief prayed for in the Complaint, except that it has jurisdiction pursuant to Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g), to review the decision rendered by the Referee on July 9, 1953, which constitutes the defendant's final decision, and to enter a judgment

affirming, modifying, or reversing that decision with or without remanding the cause for a rehearing.

Wherefore, defendant prays for judgment in accordance with Section 205(g) of the Social Security Act, as amended, 42 U.S.C.A. 405(g), affirming the decision complained of; and that the Complaint be dismissed; and that defendant recover its costs and disbursements incurred herein.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief, Civil Division;

/s/ LOUIS LEE ABBOTT,
Assistant U. S. Attorney,
Attorneys for Defendant.

EXHIBIT A

In the District Court of the United States in and
for the Southern District of California, Central
Division

Civil Action No. 16010T

RALPH B. THORBUS,

Plaintiff,

vs.

OVETA CULP HOBBY, Secretary, Department
of Health, Education, and Welfare,

Defendant.

CERTIFICATION

I, Joseph E. McElvain, Chairman, Appeals Council, Social Security Administration, Department of Health, Education, and Welfare, under authority conferred upon me by the Secretary, hereby certify that the documents annexed hereto constitute a full and accurate transcript of the entire record of proceedings relating to the claim of Ralph B. Thorbus for old-age insurance benefits under Title II of the Social Security Act, as amended, such transcript, including application for benefits, testimony and other evidence upon which the decision of the referee of the Appeals Council, Social Security Administration, was based.

Date: December 16, 1953.

[Seal] /s/ JOSEPH E. McELVAIN,
Chairman, Appeals Council, Social Security Administration, Department of Health, Education and Welfare. [20]

Department of Health, Education, and Welfare,
Social Security Administration, Washington,
D. C. Office of Appeals Council.

September 22, 1953.

In the case of Ralph B. Thorbus, Claimant and
Wage Earner, Social Security Account No.
548-24-2990.

Mr. Ralph B. Thorbus,
305 W. 8th Street,
Los Angeles, California.

Dear Mr. Thorbus:

There is enclosed herewith a copy of the Appeals Council's denial of your Request for Review of the referee's decision on your claim for old-age insurance benefits. Your Request for Review having been denied, the referee's decision stands as the final administrative decision on your claim.

If you desire a review of the referee's decision by a court, you may file a civil action in the district court of the United States in the judicial district in which you reside within sixty days from this date. For your information as to the action in the district court, your attention is directed to section 205(g) of the Social Security Act, as amended. If such an action is filed, Oveta Culp Hobby, Secretary of Health, Education, and Welfare, is the proper defendant.

Sincerely yours,

/s/ JOSEPH E. McELVAIN,
Chairman.

Enclosure.

cc—Referee Landfair,
F. O. Los Angeles, Calif.

mw:mw

[In Margin]: 740366.

[Stamped]: Department of Health, Education,
and Welfare, Sept. 23, 1953. Signed and [21]
Mailed.

(File Copy.)

Department of Health, Education, and Welfare,
Social Security Administration, Office of Ap-
peals Council

Denial of Request for Review

Case No. 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of:

Ralph B. Thorbus (Claimant)

Ralph B. Thorbus (Wage Earner)

548-24-2990 (Social Security Account No.)

This case is before the Appeals Council upon the
request of the claimant for review of the referee's

decision, rendered on the 9th day of July, 1953. We are of the opinion that a review of the referee's decision would result in no advantage to the claimant; therefore, the Request for Review is hereby denied.

OFFICE OF APPEALS
COUNCIL,

/s/ JOSEPH E. McELVAIN,
Chairman.

Date: September 22, 1953. [22]

Federal Security Agency
Social Security Board
Office of Appeals Council

Request for Review of Referee's Decision

Claim for: Old-Age Insurance Benefits.

Case No.: 2518-10A.

In the case of—

Ralph B. Thorbus (Name of claimant).

Ralph B. Thorbus (Wage earner's name).

548-24-2990 (Social Security Account number).

To the Appeals Council:

I disagree with the referee's decision on the above claim and request that the Appeals Council review it.

Remarks: (If you wish you may use this space for statement of reasons for disagreement.)

(See rider and affidavit attached hereto and made a part hereof.)

/s/ RALPH B. THORBUS,
305 W. 8th Street,
Los Angeles, California.

Date: July 31, 1953.

Acknowledgment of Request for Review
of Referee's Decision

Your request for review of the referee's decision in this case was filed on Aug. 3, 1953, at Los Angeles 12, Calif.

The Chairman of the Appeals Council will notify you of the Council's action on your request.

(For the Social Security Board.)

By /s/ A. WEISS,
Claims Assist.,
Los Angeles 12, Calif.

To: Ralph B. Thorbus,
821 S. Hope St.,
Los Angeles 17, Calif.

[Stamped]: Department of Health, Education
and Welfare. [23]

The claimant respectfully disagrees with the decision of Referee John L. Landfair and requests that the said Appeals Council review it.

The claimant, as basis for the appeal, submits the following:

The decision of the Referee from which this appeal is taken is in effect that claimant has no self-employed income as a basis for his claim for benefits on the theory that the two years of such income, the existence of which is not in question, was rental from real estate.

This theory is contrary to the actual facts.

It is submitted that claimant's income was that of a self-employed person, as defined under provisions of the United States Code, Title 42, Section 411 (Sec. 211 of Social Security Act), as amended in 1950, and was not a rental from real estate as is referred to in Subparagraph (a) (1) of the above-referred-to Section. It is further submitted that said income is not rental from real estate under Title 20, Section 404.1052 (a) (3) of Regulation No. 4, approved December 18, 1951, being derived from payments for use or occupancy of rooms and apartments where services were rendered to the occupants.

The claimant himself did not own the real estate but leased the same unfurnished from the owner thereof, the First Methodist Church of Los Angeles, and paid to the owner the full rental value thereof. This full rental value of the real estate was de-

ducted as expense in determining claimant's self-employed income which he returned in good faith and on which he paid the tax for two full years under said Title 42, Section 411. Said self-employed income was derived from claimant's services furnished to his guests and from payments for the use or occupancy of furnished rooms and apartments and for supplies and other services which he provided through his employees.

Claimant devoted his full time to the operation of said 72-room house and kept himself available on a 24-hour basis subject to call.

This factual situation is entirely different from that contemplated by Congress in adopting said Section 411, Title 42 (Section 211 (a) (1) of the Social Security Act as amended) where it is clear that the persons intended to be excluded are the owners of real estate collecting rentals thereon and supplying only minor or no services.

In further support of claimant's appeal, the affidavit of claimant is attached hereto.

/s/ RALPH B. THORBUS. [24]

Before the Honorable Appeals Council of the Department of Health, Education and Welfare,
Social Security Administration

AFFIDAVIT IN SUPPORT OF
CLAIM OF RALPH B. THORBUS

Case No. 2518-10A

Social Security Act No. 548-24-2990

State of California,
County of Los Angeles—ss.

Ralph B. Thorbus, being first duly sworn, deposes and says:

That he is the claimant for old age insurance benefits in Case No. 2518-10A in connection with Social Security Account No. 548-24-2990, and is the Appellant from the Referee's decision therein. That he makes this affidavit in support of his said claim and his appeal.

That during the entire years 1951 and 1952 he leased from the owner thereof certain real estate consisting of a lot and an unfurnished 72-room building thereon, and paid to the said owner of said real estate the full rental value thereof.

That said rental of said real estate was deducted by claimant in determining the income which affiant in good faith voluntarily returned as income from self-employment and upon which he paid taxes for said two years pursuant to Instruction No. 5 on

Schedule C, filed with the U. S. Collector of Internal Revenue with Form 1040.

That, therefore, no part of claimant's said income so returned was derived from the rental of real estate, nor from personal property leased therewith.

That the whole of said income which is the basis of affiant's claim was derived from services furnished to his guests by claimant and from payment for the use and/or occupancy of furnished rooms and apartments.

That claimant serviced the said 72 rooms in the said house and supplied hotel-like services to the guests. In addition to supplying heat, light and janitorial services, as does any hotel or boarding house, the claimant rendered additional services, some of which were as follows:

(1) He provided a manager and desk clerk who worked on a full time basis and on whose salary claimant paid Social Security and other taxes, and whose duties included taking care of the various needs of the tenants, as is the custom of such employee in a hotel, including, among other things, receiving and sorting mail, taking messages for guests and telephone service;

(2) He supplied linen, such as sheets, pillow cases, and towels for the guests, and provided for the laundering of same. Claimant made charge for the laundering, receipts from which were declared and included as part of the income upon which this

claim is based, and [25] said receipts certainly cannot be classified as rentals from real estate;

(3) The claimant provided telephones on each of the floors of the building, and the manager or he, himself, would answer the telephone calls and call the guests to the phone by means of a buzzer system. Phone calls to which the claimant or the manager would call guests on some days numbered as many as 100;

(4) He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests;

(5) He provided gas cooking stoves and paid all the utilities charges in connection with the use of same;

(6) He provided all of the repair work necessary to the room or facilities for which, under ordinary conditions, the guest would be required to pay;

(7) He provided complete laundry facilities for all guests, including tubs, clotheslines, clothespins, ironing boards, and electric irons;

(8) He supplied dishes and cooking utensils for all guests;

(9) He provided for the sorting and placing of guests' mail in individual mail boxes.

In conclusion, it is respectfully submitted that the claimant is entitled to the benefits of the Social Security Act as a self-employed person because of

his two years' income derived from said services rendered as an apartment house operator and from payments for the use or occupancy of furnished rooms and apartments, and that the decision of the Referee should be reversed by the Appeals Council.

/s/ RALPH B. THORBUS.

Subscribed and Sworn to Before Me This 31st day of July, 1953.

/s/ GIRARD F. BAKER,

Notary Public in and for Said
County and State. [26]

Department of Health, Education, and Welfare,
Social Security Administration, Office of Ap-
peals Council

REFEREE'S DECISION

Case No.: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the case of:

Ralph B. Thorbus (Name of Claimant)

Ralph B. Thorbus (Wage Earner's Name)

548-24-2990 (Social Security Account No.)

The above matter is before the referee on appeal from a determination by the Bureau of Old-Age and

Survivors Insurance of the Social Security Administration, Department of Health, Education, and Welfare. The claimant, Ralph B. Thorbus, disagreed with the Bureau's determination by filing a request for a hearing before a referee. After due notice, a hearing was held at Los Angeles, California, on June 10, 1953, before the undersigned referee. The claimant was present and participated in the hearing.

The issue in this matter is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

The Bureau determined that this claimant had no quarters of coverage to meet the term "a fully insured individual" at the time he filed his application on February 25, 1953. The claimant feels he would have the necessary six quarters of coverage if his net earnings from self-employment derived from rental of apartment units in the years 1951, 1952 and up to January 19, 1953, were considered. It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units, including linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the

units and provides utilities to the tenants for definite rentals by the week.

Section 211(a) of the Social Security Act, as amended in 1950, provides that in computing gross income and deductions for the purposes of determining net income from self-employment, there shall be excluded: [27]

“* * * rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto, unless such rentals are received in the course of a trade or business as a real estate dealer.”

Regulations No. 4, approved December 18, 1951, in section 404.1052, with respect to the above exclusion, provides as follows:

“404.1052—Income excluded from net earnings from self-employment. For the purpose of computing net earnings from self-employment, the gross income derived by an individual from a trade or business carried on by him, the allowable deductions attributable to such trade or business, and the individual's distributive share of the ordinary net income or ordinary net loss from any trade or business carried on by a partnership of which he is a member shall be computed in accordance with the following special rules:

“(a) Rentals from real estate:

“(1) Rentals from real estate (including personal property leased with the real estate), and the deductions attributable thereto, unless such rentals

are received by an individual in the course of a trade or business as a real estate dealer, are excluded. Whether or not an individual is engaged in the trade or business of a real estate dealer is determined by the application of the principles followed in respect of the taxes imposed by sections 11 and 12 of the Internal Revenue Code. In general, an individual who is engaged in the business of selling real estate to customers with a view to the gains and profits that may be derived from such sales is a real estate dealer. On the other hand, an individual who merely holds real estate for investment or speculation and receives rentals therefrom is not considered a real estate dealer. Where a real estate dealer holds real estate for investment or speculation in addition to real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, only the rentals from the real estate held for sale to customers in the ordinary course of his trade or business as a real estate dealer, and the deductions attributable thereto, are included in determining net earnings from self-employment; the rentals from the real estate held for investment or speculation, and the deductions attributable thereto, are excluded.

“(2) Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple-housing units are generally rentals from real estate. Except in the case of real estate dealers, such payments are excluded in determining net earnings from self-employment even though such

payments are in part attributable to personal property furnished under the lease.

“(3) Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the [28] use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant. * * *”

Under the law and regulations it is clear that the rentals received from an apartment house, for either furnished or unfurnished units, ordinarily constitute rental from real estate so that the only question is whether or not services of such a nature are rendered to remove them from that category and, in effect, to place the owner or lessee in the position of running an apartment hotel. Since section

404.1052(a)(3) of the Regulations No. 4 provides that the furnishing of heat and light, the cleaning of the public entrances, exits, stairways and lobbies, the collection of trash, etc., are not sufficient services in connection with the renting of rooms in rooming houses, it is the referee's opinion that similar services rendered in connection with an apartment house are likewise insufficient in connection with the renting of apartments in an apartment house, furnished or unfurnished, and that the rentals continue to be excluded as rentals from real estate. The claimant does not allege he is a real estate dealer.

It is the finding of the referee that the claimant needed six quarters of coverage for a fully insured status; he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and up to January 19, 1953, constitute rentals from real estate and thus are excluded as net income from self-employment.

Inasmuch as the claimant did not meet one of the principal requirements for entitlement to old-age insurance benefits, i.e., he was not a fully insured individual, it is the decision of the referee that the claimant is not entitled to the benefits for which he filed application.

Date: July 9, 1953.

/s/ JOHN L. LANDFAIR,
Referee. [29]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Notice of Hearing

Case No: 2518-10A.

Claim for: Old-Age Insurance Benefits.

In the Case of:

Ralph B. Thorbus (Name of Claimant).

Ralph B. Thorbus (Wage earner's name).

548-24-2990 (Social Security account number).

To: Mr. Ralph B. Thorbus,
305 W. 8th Street,
Los Angeles 14, California.

Pursuant to your written request and the provisions of Section 205(b) of the Social Security Act, as amended, a hearing will be held by the undersigned, a referee of the Social Security Administration, Department of Health, Education, and Welfare, on the 10th day of June, 1953, at 1:30 p.m. o'clock in Room 330 of U. S. Post Office & Courthouse Building, 312 N. Spring Street, Los Angeles, California.

The issue to be determined is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

The matters of fact on which findings will be made are whether claimant's income from operation of an

apartment house was excluded from "net earnings from self-enmployment" as rentals from real estate.

You may present at the hearing evidence on the matters of fact, either in the form of written documents or the testimony of witnesses.

You may call upon the manager of the Field Office of the Social Security Administration, Federal Security Agency, nearest your home for information and advice with regard to the hearing and the matters to be considered.

Important—Please sign and return at once the enclosed postal card notifying me whether you will be present at the above time. No postage is required on this card.

Remarks:

Date May 28, 1953.

JOHN L. LANDFAIR,

Referee.

Room 206, P. O. Building.
Glendale 5, Calif. [30]

Federal Security Agency
Social Security Administration
Office of Appeals Council

Request for Hearing

2518-10A

Claim for: Primary Benefits (Self-Employment).

In the case of:

Ralph B. Thorbus (Claimant).

Same (Wage earner).

548-24-2990 (Social Security Account Number).

To the Social Security Administration:

I disagree with the determination made on the above claim, and therefore request a hearing before a referee of the Social Security Administration. If convenient, I would like to have this hearing held on or about May 15, or any time at convenience of referee at or near Los Angeles, California.

Remarks:

(This space may be used for statement of your reasons for disagreement.)

I disagree with the determination that my income in 1951 and to 1952 was income from Real Estate Rentals and not self-employment income. I consider myself to be a self-employed person.

4/17/53

/s/ RALPH B. THORBUS,
(Claimant.)
305 W. 8th St.,
Los Angeles 14, Calif.

To: John L. Landfair, Referee,
313 E. Broadway,
Glendale, California.

[Stamped]: Received April 20, 1953. [31]

Case No. 2518-10A

Exhibits

Claim File
Page No.

A—Application for Old-Age Insurance Benefits
Signed by Ralph B. Thorbus, Dated February
25, 1953..... 1

B—Profit or Loss From Business or Profession
for Year 1952, Executed by Ralph B. Thorbus
(Copy)3-4

C—Schedule of Profit or Loss from Business or
Profession and Computation of Self-Employ-
ment Tax (for old-age and survivors insur-
ance) for Year 1951, Executed by Ralph B.
Thorbus 5

D—Statement of Claimant or Other Person,
Signed by Ralph B. Thorbus, Received in
Field Office February 25, 1953..... 8

E—Annual Report of Net Earnings from Self-Employment for Taxable Year, Signed by Ralph B. Thorbus, Dated February 25, 1953.	9
F—Copy of Letter to Ralph B. Thorbus from Social Security Administration, Dated April 1, 1953.....	13

Ralph B. Thorbus—Case No. 2518-10A
Los Angeles, California—June 10, 1953

Opening Statement by the Referee:

This is case number 2518-10A, wherein Ralph B. Thorbus filed an application for old-age and survivors insurance benefits on February 25, 1953. He based his application on self-employment income as a manager or operator of an apartment house.

On April 1, 1953, the Bureau of Old-Age and Survivors Insurance disallowed Mr. Thorbus' claim stating they determined his income in 1951 and 1952 was income from real estate rentals and not self-employment. Mr. Thorbus disagreed with the Bureau's determination, feeling he was a self-employed person and that the profits he made should be credited on his record, and requested a hearing before a referee, which hearing is now in progress in Los Angeles, California, this 10th day of June, 1953.

In short, Mr. Thorbus, is that about what happened?

Mr. Thorbus: Yes.

The Referee: The issue to be determined in this

case is whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953.

Do you understand that to be the issue?

Mr. Thorbus: Yes.

The Referee: At this time I will introduce the following exhibits we have in the record. (Reads list of Exhibits A through F to claimant.)

RALPH B. THORBUS

the claimant herein, being first duly sworn, testified as follows: [33]

Examination by the Referee

Q. What is your full name?

A. Ralph B. Thorbus.

Q. Where do you live, Mr. Thorbus?

A. 821 South Hope, Los Angeles, California.

Q. Is that your signature on Exhibit A, which is an application?

(Shows Exhibit A to claimant.)

A. Yes, sir.

Q. During the years 1951 and 1952, what business were you in?

A. This apartment house business.

Q. Did you have an apartment house that you supervised or rented or leased?

A. I leased it from the First Methodist Church, of Los Angeles.

Q. What is the name of the apartment house?

A. Knickerbocker Apartments.

(Testimony of Ralph B. Thorbus.)

Q. How many apartments are there?

A. Thirty-seven.

Q. Do they all have modern conveniences?

A. Yes.

Q. Baths and stoves?

A. Yes, baths and that, but, of course, it is badly run down.

Q. Who furnished the furniture inside the apartments? A. I bought that 22 years ago.

Q. Such as stoves, chairs, etc.?

A. The usual equipment of a simple apartment house or rooming house, [34] whatever you want to call it.

Q. They paid you so much money for the rental of each apartment?

A. Each apartment had a tenant and paid so much a week.

Q. What were the rentals a week?

A. They run from \$4.00 to \$6.50 a week.

Q. Was that with a bath in each one?

A. All had baths.

Q. How about stoves?

A. Everybody had a stove.

Q. You furnished that and you furnished the other equipment?

A. I furnished all the other equipment.

Q. How about the linens?

A. Some people had their own, but I had a supply they could rent if they needed them.

Q. They could rent the linens from you?

A. Yes.

(Testimony of Ralph B. Thorbus.)

Q. Where did you keep the linens?

A. In my office.

Q. You kept the linens in there? A. Yes.

Q. If John Jones had an apartment there and wanted to change his linen, he would bring his dirty linen down to you and pick up the other from you?

A. Yes, and pay the cost of the laundry.

Q. And the rental value of the linens if he didn't have his own? [35]

A. Whatever it cost for the laundering. We always spoke of it as being laundry charge.

Q. He paid just for the laundering?

A. Yes.

Q. How about the forks and spoons?

A. They were supplied, all utensils and dishes.

Q. The cooking utensils and stove were furnished? A. Yes.

Q. What about their ice boxes?

A. They had wooden boxes, but they furnished their own ice. The iceman would come through every noon.

Q. How often would you renovate the apartment? After a man left or would you renovate it ever so often anyway, such as painting and cleaning up?

A. All the time we were doing that. We had a sign stuck out in front and would show the apartments to the callers as they came in. Of course there is nothing now or in the last year like it was in the 30's.

(Testimony of Ralph B. Thorbus.)

Q. If they came into the apartment and rented from you by the week, would they sign a lease?

A. No.

Q. They had a tenancy by sufferance? If you didn't want them you would tell them to get out?

A. Oh, yes.

Q. But if they stayed on from week to week they were tenants? A. Yes. [36]

Q. Did they pay rent weekly or monthly?

A. Weekly.

Q. How many employees did you have for yourself? A. One. That is the housekeeper.

Q. What would she do?

A. She would take care of the office and show callers around.

Q. She would show the apartments to prospective new tenants?

A. Oh, yes, to inquirers.

Q. Did she go in and sweep any of the apartments? A. No, no.

Q. After they had moved, she didn't give any inside service?

A. No, we turned the apartments over all cleaned.

Q. Then they would take care of it from there on? A. Yes.

Q. Did you furnish brooms and things like that?

A. Yes. There were back porches on each floor and there were rubbish barrels there.

Q. Were they supposed to carry the garbage to the barrels?

(Testimony of Ralph B. Thorbus.)

A. Most people would carry that kind of stuff to the barrel on their floor.

Q. Like the combustible garbage?

A. Yes.

Q. Did you have an incinerator?

A. No. The rubbish collector come three times a week and picked it up. [37]

Q. And the same was true with the combustible garbage?

A. Big trucks would come around early in the morning, see, and pick that up.

Q. There was one place it had to be put in?

A. On each floor, yes.

Q. They would put it all in one place and it was up to you to get it hauled away?

A. Yes, we had to move it down so it could be taken away.

Q. How about the garbage?

A. The garbage was handled the same way in cans. There was three different services that I employed.

Q. It was up to you to take care of that?

A. Oh, yes.

Q. After you had rented the apartment you didn't go inside? A. No.

Q. Did you furnish utilities?

A. Yes, I did.

Q. Water and electricity?

A. We furnished that.

Q. That was in the bargain?

A. Yes, and it was free, incidentally.

(Testimony of Ralph B. Thorbus.)

Q. Where did you get your right to rent the apartment? Did you have a lease?

A. Yes, from the First Methodist Church.

Q. What did you have to pay annually for that lease? [38]

A. It is about \$300.00 a month.

Q. You paid by the month on your lease?

A. Yes.

Q. And it was up to you to decide whether you could make anything or not?

A. You bet. Incidentally, the church occupied the front room in the basement for a Sunday School room. They rebated to me so much for estimated light and water.

Q. But not for the space?

A. No, that was held out on me when I signed the lease. But I was allowed \$3.25 a month for the light and water.

Q. And you paid them monthly?

A. I paid them monthly.

Q. But you collected from your tenants weekly?

A. Yes.

Q. Do you think I have everything in here I need to have in this case, with that letter you gave to me?

A. I think so.

Q. Do you have any proposed findings or conclusions you want to make in your case, Mr. Thorbus?

A. I am 73 years old to begin with. I have put in a good long time there.

Q. Over 22 years?

A. Yes, 22 years. This buyer came along with

(Testimony of Ralph B. Thorbus.)

pocket full of money and he bought the [39] property.

Q. You sold it to him?

A. The church sold the ground and building.

Q. Did you get any recovery on your lease?

A. How's that?

Q. Did they make a settlement with you for the rest of your lease?

A. Well, no, not in that way. The idea was when he came along and finally made a deal with them, why, it was up to me to protect myself. He was Jewish—and I am holding nothing against Jews at any time at all—but naturally he made the best kind of a deal on me.

Q. He bought your equipment?

A. He bought my furniture and gave me \$1,000, and after a lot of dickering, I got 6 months' free rent. I am finishing that up.

Q. From your lease? A. Yes.

Q. Mr. Thorbus, I am not permitted to give verbal decisions in these cases. I have to study what you have told me, apply the law to the facts, and issue a written decision.

* * *

We have read the foregoing transcript and certify that it is a true and complete record of the hearing.

/s/ JOHN L. LANDFAIR,
Referee.

/s/ MIRIAM GARNER,
Reporter.

Date: June 10, 1953. [40]

FEDERAL SECURITY AGENCY
SOCIAL SECURITY ADMINISTRATION
Bureau of Old-Age and Survivors Insurance

Form approved
Budget Bureau No. 75-81884

RECEIVED
FEB 25 1953
C. C. ...

APPLICATION FOR OLD-AGE INSURANCE BENEFITS

IF YOU NEED HELP IN COMPLETING THIS APPLICATION, CALL AT, WRITE TO, OR TELEPHONE THE NEAREST FIELD OFFICE OF THE SOCIAL SECURITY ADMINISTRATION

All items on this form requiring an answer must be answered or marked "Unknown."

NOTICE.—Whoever makes or causes to be made any false statement or representation in connection with an application for Federal old-age and survivors insurance benefits is subject to not more than a \$1,000 fine or one year of imprisonment, or both.

I, Naiph Benjamin I. Forbes 348-24-299
(Name as it appears on my Social Security account number card) (Social Security account number)

hereby apply for the insurance benefits payable to me under the provisions of Title II of the Social Security Act, as amended.

1. When were you born? 2nd 3 8th
(Month) (Day) (Year)

2. Where were you born? Leota 3 Virginia
(City or town) (County) (State or foreign country)

3. Were you in the active military or naval service of the United States after September 15, 1940, and before July 25, 1947? No
(Yes or no)

If "Yes," have you received, or do you expect to receive, a benefit from any Federal agency other than the Social Security Administration? No
(Yes or no)

If "Yes," what agency? No
(Yes or no)

4. Are you married? No
(Yes or no)

If "Yes," give the following information: Wife's or husband's name _____

Age _____ Date of birth _____ Date of your marriage _____

Social Security account number of husband or wife, if age 65 or over _____

If you are a married woman, is your husband dependent on you for most of his support? No
(Yes or no)

5. Have you any children, including stepchildren and adopted children, under 18 years of age and unmarried? No
(Yes or no)

If "Yes," how many _____

6. Give names of employers during the last 12 months:

NAME OF EMPLOYER	ADDRESS OF EMPLOYER	WORK BEGAN		WORK ENDED	
		MONTH	YEAR	MONTH	YEAR
<u>None</u>					

(If you need more space, continue your entries under "Remarks" (on other side) or attach a separate sheet)

7. About how much were you paid during the two calendar quarters before this one? A calendar quarter is a 3-month period beginning January 1, April 1, July 1, or October 1. 2518-10A

8. May we ask your employers for a report of your wages if we find it necessary? No
(Yes or no)

9. Have you as a self-employed person (whether as a sole owner or partner) received income from a trade or business at any time after December 31, 1950? No
(Yes or no)

If "Yes," during what period? From 1-1-51 To 1-1-51

What kind of trade or business? Garment House

Form OA-C1
(2-51)

(OVER)

2518-10A

Old-age insurance benefits are not payable for any month in which you work, while under age 75, for wages of more than \$50 in employment covered by the Social Security Act. (In questions 10 through 13, "wages" means pay for employment covered by the Social Security Act. If you do not know whether your employment is covered, ask the nearest office of the Social Security Administration.)

10. Are you now working for wages of more than \$50 a month? Yes
(Yes or no)
11. Did you work for wages of more than \$50 in any of the last 7 months including the present month? Yes
(Yes or no)

If "Yes," give the months: _____

(It is not necessary to include any month before you were 64 years old)

12. Do you agree to notify the Social Security Administration promptly when you work for wages of more than \$50 a month while you are under age 75? Yes
(Yes or no)
13. Do you agree to return any check sent to you for any month in which you have worked for wages of more than \$50 while you are under age 75? Yes
(Yes or no)

Old-age insurance benefits are not payable for one or more months if you, while under age 75, render substantial services as a self-employed person (whether as sole owner or partner) in a trade or business which is covered by the law, and have net earnings from self-employment which average more than \$50 a month for the taxable year. An annual report must be filed with the Social Security Administration after the end of any taxable year (which begins before the month in which you attain age 75) in which you have net earnings from self-employment averaging more than \$50 a month. (The term "self-employed person" used in the following questions means an individual engaged as sole owner or partner in a trade or business covered by the Social Security Act. If you do not know whether your self-employment is covered, ask the nearest office of the Social Security Administration.)

14. Are you now rendering substantial services as a self-employed person and do you expect to receive net earnings which will average more than \$50 a month for this taxable year? Yes
(Yes or no)
15. Did you render substantial services as a self-employed person in any of the last 7 months, including the present month, and have you received or do you expect to receive net earnings averaging more than \$50 a month for the taxable year (or for each of the taxable years involved)? Yes
(Yes or no)

If "Yes," give the months: all through taxable year

(It is not necessary to include any month before you were 64 years old)

16. Do you agree to notify the Social Security Administration promptly when you expect that your net earnings from self-employment will average more than \$50 a month for a taxable year which begins before the month in which you attain age 75? Yes
(Yes or no)
17. Do you agree to file with the Social Security Administration an annual report after the end of any taxable year which begins before the month in which you attain age 75, in which you have net earnings from self-employment averaging more than \$50 a month? Yes
(Yes or no)

If you do not report as agreed in Items 12 and 17 above, you may lose additional months' benefits.

REMARKS: (This space may be used for explaining any answers to the questions.)

I'm railroad employee. Regarding some items, I did not realize we, \$900.00 net in wages 1953 and do not expect it to be in business employment here.

Knowing that anyone who makes a false statement or misrepresents in connection with Federal old-age and survivors insurance benefits is committing a crime punishable under Federal law, I certify that the above statements are true.

If this application has been signed by mark (X), two witnesses who know the applicant must sign below, giving their full addresses.

1. _____
(Name)

(Street and number)

(Zone number)
(State)
(Name)

(Street and number)

(Zone number) (State)

2. _____
(Name)

(Street and number)

(Zone number) (State)

Signature of applicant (write in ink):
Ralph B. Johnson
(First name) (Middle initial) (Last name)
Address:
21 S. Hope St.
(Street and number)
Los Angeles 17, Cal.
(City) (Zone number) (State)
Telephone number at which I can be reached:
AD 2-619
(If none, write "None")
Date: _____
(Month) (Day) (Year)

COMPUTATION OF SELF-EMPLOYMENT TAX
(For old-age and survivors insurance)

Name of self-employed person Ralph B. Thorbus

State nature of business, if any, subject to self-employment tax Apartment-House Operator

24. Net profit (or loss) shown on line 23, page 1.	\$ 3993	46
25. Losses of business property shown on line 15, page 1.		
26. Total of lines 24 and 25.	\$ 3993	46
27. Less: Net income (or loss) from excluded services or sources included in line 26. Specify excluded services or sources		
28. Net earnings from self-employment (line 26 less line 27).	\$ 3993	46
29. Net earnings (or loss) from self-employment from partnerships, joint ventures, etc. (from column 10, Schedule K, Form 1065).		
30. Total net earnings (or loss) from self-employment (line 28 plus line 29) (If total of net earnings is under \$400, do not make any entries below)	\$ 3993	46
31. Maximum amount subject to self-employment tax	\$ 3,600	00
32. Less: Wages paid to you during the taxable year which were subject to withholding for old-age and survivors insurance. (If such wages exceed \$3,600, enter \$3,600).		
33. Maximum amount subject to self-employment tax after adjustment for wages	\$ 3,600	00
34. Self-employment income subject to tax—Line 30 or 33, whichever is smaller.	\$ 3600	00
35. Self-employment tax—2½ percent of amount on line 34. Enter here and as item 5 (B), page 1, Form 1040.	\$ 81	00

U.S. 10-50222-2

FILL IN ITEMS BELOW BUT DO NOT DETACH

Schedule C-a (Form 1040)
U.S. TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE

U. S. REPORT OF SELF-EMPLOYMENT INCOME
(For Federal Old-Age and Survivors Insurance)

1952

For calendar year 1952 or fiscal year beginning, 1952, and ending, 195
State nature of business subject to self-employment tax Apartment House Operator

ENTER HERE THE SOCIAL SECURITY ACCOUNT NUMBER OF THE PERSON NAMED BELOW



000	00	0000
548	24	2990

Enter total net earnings from self-employment shown on line 30 above. \$ 3993.46

ENTER BELOW, NAME OF SELF-EMPLOYED PERSON AND BUSINESS ADDRESS

RALPH B. THORBUS	
(Name)	
821 So. Hope St.	
ADDRESS (Street and number, or rural route)	
Los Angeles 17	California
(City or town, postal zone number)	(State)

Enter wages shown on line 32 above. \$ none

Enter self-employment income shown on line 34. \$ 3600.00

Enter 3

Federal Security Agency
Social Security Administration
Bureau of Old-Age and Survivors Insurance

548-24-2990 (Social Security Account Number)

Ralph B. Thorbus (Name of Wage Earner or Self-Employed Person)

Statement of Claimant or Other Person

Notice.—Whoever makes or causes to be made any false statement or representation in connection with an application for Federal old-age and survivors insurance benefits, is subject to not more than a \$1,000 fine or one year of imprisonment, or both.

Understanding that this statement is for the use of the Bureau of Old-Age and Survivors Insurance, I hereby certify that—

The attached copies of Schedules C for 1951 and 1952 are true and exact copies of separate Schedules C filed with the Director of Internal Revenue.

I further certify that the 1951 Schedule C was filed on or before March 15, 1952. [46]

Knowing that anyone who makes a false statement or misrepresents in connection with Federal old-age and survivors insurance benefits is committing a crime punishable under Federal law, I

Signature (write in ink):

/s/ RALPH B. THORBUS.

Address:

821 So. Hope St.,
Los Angeles 17, Calif.

Date: Feb. 26, 1953. [47]

EXHIBIT D

Case No. 2518-10A

Federal Security Agency
Social Security Administration
Bureau of Old-Age and Survivors Insurance
548-24-2990 (Social Security Account Number)
Ralph B. Thorbus (Name of Wage Earner or Self-
Employed Person)

Statement of Claimant or Other Person

Notice.—Whoever makes or causes to be made any false statement or representation in connection with an application for Federal old-age and survivors insurance benefits, is subject to not more than a \$1,000 fine or one year of imprisonment, or both.

Understanding that this statement is for the use of the Bureau of Old-Age and Survivors Insurance, I hereby certify that—

The tenants in my apartment house during the period 1-1-51 to 1-19-53, the date I no longer had the lease of the apartment house, received the following services: I furnished them with linens. Of course the tenants had to pay for the laundry of same, that is, upon getting the linens from me or the housekeeper, the tenants were charged for a clean sheet 10c, pillow slip 5c, hand towel 3c, bath towel 7c, dish towel 3c. In the apartment house, I had a call bell system in calling the tenants to the phone, one phone located on each of the three floors in the building. The apartment house consisted of 37 apartments. In addition to this my housekeeper kept the halls clean and carried the rubbish to the back yard after the tenants had carried down same to the back porch of the apartment house. Whenever our tenants had callers, my housekeeper or I directed the callers to the correct apartment, the apartments being numbered. The tenants were furnished with gas, lights and heat. [48]

Knowing that anyone who makes a false statement or misrepresents in connection with Federal old-age and survivors insurance benefits is committing a crime punishable under Federal law, I certify that the above statements are true.

Signature (write in ink):

/s/ RALPH B. THORBUS. [49]

Federal Security Agency
Social Security Administration
Bureau of Old-Age and Survivors Insurance

548-24-2990 (Claim number)

Annual Report of Net Earnings from
Self-Employment for Taxable Year

All individuals under age 75 receiving old-age and survivors benefits must file this report if the individual had net earnings from self-employment of more than \$900 for the full taxable year. If the individual dies, a representative of his estate should file this report. It must be filed with the Social Security Administration within two months and fifteen days after the close of the taxable year.

Failure to File an Annual Report Within This Period May Result in Loss of Additional Benefits.

For an explanation of the effect of this Annual Report on your social security benefits, see the reverse side of this form.

Notice.—Whoever makes or causes to be made any false statement or representation (1) in connection with an application for Federal old-age and survivors insurance benefits, or (2) for other social security purposes is subject to not more than \$1,000 fine or one year's imprisonment, or both.

If you need help in completing this report call at, write to, or telephone your field office of the Social Security Administration.

1. This report is for my taxable year ending:
Month, 12; Day, 31; Year, 52.

2. Were your net earnings from self-employment \$1,800 or more? (Yes or No): Yes.

If Item 2 Is "No," Answer Items 3, 4, and 5

* * *

5. Were you the sole lessee of the trade or business? (Yes or No): Yes.

6. (a) Did you engage in self-employment, i.e., take part in the operation or management of a trade or business, in all months of the past taxable year? (Yes or No): Yes.

Instructions.—List below any full months in which you did not engage in business because you did not own the business, you had extended illness, someone else operated your business, etc. Where possible give an explanation for listing the month. For example, if you bought your business in March you would list January and February and opposite these months you would list as an explanation, "Not in Business—Bought Business March 8."

Months:

Explanation

7. Do you expect your net earnings from self-employment to exceed \$900 for the current taxable year? (Yes or No): No.

I made \$900.00 net this year 1-1-53 to 1-19-53 and rendered substantial services.

Date: 2-25-53.

Signature:

/s/ RALPH B. THORBUS. [50]

Information About Your Annual Report of Net Earnings from Self-Employment

Who Must File.—A beneficiary under age 75 during any part of his taxable year who (1) had net earnings averaging more than \$75 a month for the taxable year or (2) had benefits withheld because of his self-employment during the past year must file an Annual Report of Net Earnings from Self-Employment. (This report is in addition to your income tax return on Schedule C filed with Form 1040 with the Director of Internal Revenue.)

Purpose of Filing Annual Report.—Your Annual Report of Net Earnings from Self-Employment enables the Social Security Administration to determine how many months' benefits you should have received for the past taxable year. This report has no relation to benefits withheld or to be withheld for months you worked as an employee for wages of more than \$75 a month.

How Deductions From Benefits are Computed.—The chart below shows how the number of months of deductions will be computed which should have been imposed against your benefits for the past taxable year. The net earnings from self-employment which you received for your full taxable year, which is the amount you will show in questions 1 and 2 on the front of the form, will determine that number.

\$400	- \$900	None
900.01-	975	1 month
975.01-	1,050	2 months

1,050.01-1,125	3 months
1,125.01-1,200	4 months
1,200.01-1,275	5 months
1,275.01-1,350	6 months
1,350.01-1,425	7 months
1,425.01-1,500	8 months
1,500.01-1,575	9 months
1,575.01-1,650	10 months
1,650.01-1,725	11 months
1,725.01 and over	12 months

Question 6 will show whether the number of months of deductions, computed under the chart above, should actually be made from your benefits. For example, if you did not engage in self-employment until June, the benefits you received through May would not be affected regardless of the amount of your net earnings in your taxable year. Also, if you sold your business in July, your net earnings would not affect your benefits for months after July.

Similarly, if during some or all months during the past taxable year you retired to the extent that you did not perform substantial services in connection with your trade or business, benefits for those months would not be affected by your total earnings during that taxable year. If you believe you have not performed substantial services, please go to your Social Security Administration field office. You should be prepared to give all the facts about your self-employment.

Benefits will not be withheld because of self-employment beginning with the month in which you become age 75. [51]

(Copy)

Always give Claim No. 548-24-2900-A when writing about your claim

Federal Security Agency.
Social Security Administration
Bureau of Old-Age and Survivors Insurance

Area Office,
San Francisco, Calif.

Field Office,
U. S. P. O. & Courthouse,
Los Angeles 12, Calif.

April 1, 1953.

Ralph B. Thorbus,
821 S. Hope St.,
Los Angeles 17, Calif.

Dear Sir:

This letter refers to your claim for benefits under Title II of the Social Security Act, as amended. Our records show that you are not now entitled to old-age insurance benefits.

The Social Security Act provides for payment of old-age insurance benefits to a person who is fully insured. To be fully insured you must have 6 quarters of coverage. A quarter of coverage is a calendar quarter in which the person has been paid \$50 or more in wages or for which he has been credited, after 1950, with \$100 or more of self-employment income.

Our records show that you have 0 quarters of coverage. When you have the necessary quarters for an insured status, you may again file application for benefits.

If you do not agree with this determination, you may request us to reconsider your claim or you may request a hearing before a referee of the Social Security Administration. Additional evidence is not required, but if new evidence is available it should be submitted. A request for a reconsideration or a hearing should be made promptly, and must be filed within 6 months of this date.

If you have any questions as to your claim or wish to request a reconsideration or hearing, you should call at or write the field office shown above.

Sincerely yours,

/s/ JOSEPH C. COLUMBUS,
Chief, Area Office.

It has been determined that your income in 1951 and 1952 was income from Real Estate Rentals and not self-employment income.

Case No. 2518-10A.

Exhibit F. [52]

Los Angeles, California

June 9, 1953.

Department of Health, Education
and Welfare,
Federal Security Agency,
Federal Building,
Los Angeles 12, California.

Attention: John L. Landfair, Referee.

Re: Ralph B. Thorbus, Claim on Social
Security No. 548-24-2990A,
Case No. 2518-10A.

Gentlemen:

Supplementing my previous application and the various information heretofore furnished you, the following is an outline of the business which I conducted for some twenty-two years under which I claim the benefits of the Social Security Law.

My income was not derived from the rental of real estate. The real estate was leased by me from the First Methodist Church, and the rent thereof was a part of my operating expenses.

My income was derived from the business which I operated in conducting the house on said premises and the services which I provided in the individual rooms and apartments, and in maintaining the conveniences such as lobbies, halls, washlines on roof, telephones, providing a manager on whose salary I paid social security taxes as well as other taxes,

and other items of service too numerous to mention, but including particularly the following:

I leased part of the building from the First Methodist Church unfurnished.

I rented the rooms and apartments to individual tenants to whom I rendered services and [53] provided services in part as follows:

(1) Furnished gas, electricity, hot and cold water;

(2) Furnished telephones to which the tenants could be called by buzzers;

(3) Provided a manager in the lobby who answered telephones and inquiries and looked after things generally;

(4) Kept two apartments: one of which I lived in that I might be available at all times to take care of anything that needed to be taken care of in the house, and the other I kept as a workshop and store-room for tools and supplies;

(5) I furnished linens to all of the tenants and provided for the laundering of it at a reasonable charge, the receipts therefrom being part of the income of my business;

(6) I made whatever repairs and replacements which were necessary to maintain the respective rooms and apartments such as plumbing, repair of paper shades, stove repairs, carpets, repairs to electric wiring and equipment;

(7) I provided newspapers and magazines in the main lobby;

(8) Provided for the disposal of rubbish, empty cans and bottles and garbage from the various apartments;

(9) Kept the halls carpeted and clean and provided lighting therefor;

(10) Kept the porches and steps in front of the building clean and swept; [54]

(11) Kept the alley in the rear of the building clear and kept the rear porches on the three floors swept and clean; and

(12) Provided washlines and complete laundry facilities for the tenants' individual laundering.

In other words, my net income after paying the rent on the real estate was from the use of the furniture, furnishings and supplies, and from the services which I rendered.

I will be glad to furnish whatever corroboration of the foregoing you deem necessary.

Yours truly,

/s/ RALPH B. THORBUS,

305 West 8th St.,

Los Angeles 14, California.

Affidavit of Service by Mail attached.

[Endorsed]: Filed January 15, 1954. [55]

[Title of District Court and Cause.]

MEMORANDUM OF DECISION

This is an action to review a final decision of the Secretary of Health, Education and Welfare in which it was determined that the plaintiff herein was not entitled to old-age insurance benefits. Plaintiff applied for the benefits on the grounds that he was a self-employed person. There was no dispute that plaintiff had paid the self-employment tax for the necessary period. The Bureau denied his claim on the basis that his alleged self-employment income was "income from real estate rentals" and, hence, did not bring the plaintiff under the benefits of the Act. At plaintiff's request, he was accorded a hearing before a referee who reached a similar conclusion. [58] Plaintiff's request for a review of the referee's decision was denied by the Appeals Council and he now seeks review here.

The Social Security Act (Sec. 211(a)) provides that "* * * rentals from real estate (including personal property leased with the real estate) * * *" are not to be included in computing income from self-employment. Regulations of the Department more fully explain what income is to be excluded and what income is to be included. Regulation No. 4 (Sec. 404.1052(a)) provides in part:

"(2) Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple-housing units are generally rentals from real estate. * * *.

“(3) Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid [59] service, for example, constitutes such service; whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant.”

From this Regulation, we adduce the following criteria in determining whether or not plaintiff's income was merely from the rental of real estate. To entitle him to benefits, plaintiff's services must have been more than merely furnishing heat and light, cleaning public entrances, exits, stairways and lobbies, collecting trash, and so forth. Such services must, rather, be considered services rendered to the occupant rather than merely the normal maintenance of the building. Such services must be

primarily for the convenience of the occupant and be something more than those services usually or customarily rendered in connection with the rentals of rooms or apartments. For example, if the services rendered by the plaintiff qualify the building as an apartment house furnishing hotel services, his income from such source is not rentals from real estate and is included as self-employment income. There are no separate findings of fact. The following excerpts from the referee's written decision contain what appear to be mixed findings of fact and conclusions of law:

“It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units including linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished [60] the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the units and provides utilities to the tenants for definite rentals by the week.

* * *

It is the finding of the referee that the claimant needed six quarters of coverage for a fully insured status, he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and

up to January 19, 1953, constitute rentals from real estate and thus are excluded as net income from self-employment.”¹

There is no specific indication, nor any implication, in the referee’s decision that he did not believe any of the plaintiff’s evidence. While he undeniably had the power to disregard those parts of the plaintiff’s testimony which he deemed untrue, it appears obvious that, rather, he took the facts as testified to by the plaintiff and corroborated by the documentary evidence, and, on the basis of these facts, concluded that the plaintiff was not within the definition of self-employed but, instead, derived

¹The remarks in *La Lone v. United States*, (Wash.) 57 F. Supp. 947, at 953 (reversed on other grounds, 152 F. 2d 43) would seem applicable:

“* * * The courts do not expect of an administrative agency that exactness or nicety which the appellate courts require of us inferior judges in distinguishing between findings of fact and conclusions of law. Nonetheless, it does not seem unreasonable to me to suggest that judicial [61] review cannot be nullified by a confused mixture of findings, inferences, and conclusions in the referee’s decision. *Beaumont, S. L. & W. R. Co. vs. United States*, 282 U. S. 74, 86, 51 S.Ct. 1, 75 L.Ed. 221; *State of Florida v. United States*, 282 U. S. 194, 215, 51 S.Ct. 119, 75 L.Ed. 291; *United States v. Carolina Freight Carriers Corp.*, 315 U.S. 475, 488, 62 S.Ct. 722, 86 L.Ed. 971; *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 510, 55 S.Ct. 462, 79 L.Ed. 1023; *Eastern Central Motor Carriers Association v. United States*, 321 U.S. 194, 212, 64 S.Ct. 499. * * *.” [62]

his income from the rentals of real estate and thus was not entitled to benefits. Thus the material facts can be adduced by an examination of the plaintiff's testimony and the exhibits that were introduced, which include a statement by the plaintiff to the board, and a letter written by him to the referee.²

Plaintiff rented the entire building from the owners. In turn, he rented each apartment or room furnished with the usual equipment of a simple apartment house or rooming house. Each apartment had a bath, stove and ice box. The plaintiff furnished all utensils and dishes, including silverware and cooking utensils. Plaintiff kept a supply of linens for the tenants which he rented to them for the laundry charge. There was a telephone on each floor and plaintiff operated a bell system to call the tenants to the telephone. Each floor had a rubbish barrel into which the tenants deposited refuse. Plaintiff or his employee would carry such rubbish to the back of the apartment where it was picked up by a contract rubbish collector. The same arrangement was afforded for cans and garbage. Plaintiff or his employee directed any callers to the correct apartment. Plaintiff supplied gas, light and heat for the tenants. Plaintiff maintained, for the tenants' convenience, lobbies, halls and washlines. He provided a manager in the lobby to answer telephones

²There is no indication that the plaintiff was represented by counsel at the hearing. Rather, it appears that the examination was conducted by the referee. It is apparent that plaintiff's case was not presented as vigorously as it might have been. [63]

and inquiries. He kept a workshop on the premises and a storeroom for tools and supplies, and was available at all times to take care of anything that needed to be taken care of in the house. He made whatever repairs and replacements which were necessary to maintain the respective rooms and apartments such as plumbing, repair of paper shades, stove repairs, carpets, and repairs to electric wiring and equipment. He kept newspapers and magazines in the main lobby. He kept complete laundry facilities for the tenants' individual laundering. He kept the porches, halls and steps clean and swept. He did regular renovating of the apartments, painting and cleaning them. He showed the apartments to prospective tenants. He furnished brooms and like articles.

Under the statute and regulations, it is the Court's opinion that the decision of the Secretary and her subordinates is not supported by substantial evidence. It cannot be said that plaintiff's income was merely derived from rentals of real estate. Plaintiff's organization and management of the property clearly brings the building within the classification of an apartment house offering hotel services. The maintenance of a lobby manager, the answering of telephone calls and summoning of tenants, the referring of guests, the maintenance of a supply of linens, the providing of newspapers and magazines in the lobby—all indicate more of a hotel than an apartment atmosphere. Admittedly, plaintiff did not supply maid service. However, the other services

rendered clearly were rendered to the occupant as distinguished from the building, and were primarily for the tenants' convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. Plaintiff clearly did not render either the quantity or quality of services usually offered by first class hotels. However, within the economic group served by plaintiff's [64] building, such services might well be deemed considerable—at least clearly enough to remove the income, so derived by plaintiff, from that class of income termed merely “rentals from real estate.”

The difference between mere rentals from real estate and rental with personal services may be illustrated by the difference between the plaintiff here and plaintiff's lessor. The latter merely rents the building to the plaintiff without any services offered to the lessee. Such income clearly would appear to be merely income from real estate. Plaintiff, on the other hand, not only rented the out rooms but also offered many services to his tenants. Plaintiff's testimony, statement, and letter can lead only to the conclusion that the plaintiff worked at this apartment house, in addition to merely renting the rooms. His availability at all times to take care of anything that needed to be taken care of in the house, his making whatever repairs and replacements necessary to maintain the respective rooms and apartments, such as plumbing, repairs of paper

shades, stove repairs, carpets, and repairs to electric wiring and equipment, his maintaining of lobby facilities, the directing of guests, handling of telephone calls—all inescapably leave the conclusion that plaintiff was not merely a receiver of rentals from real estate, but rather, that he conducted a business on the premises, offering not only apartment facilities, but also many services to the occupants of the building. Any other conclusion is without support by substantial evidence. Taking the situation as a whole, the only conclusion supportable is that the plaintiff did not derive this income from mere rentals of real estate, but rather was [65] within the definition of “self-employed” and, therefore, entitled to benefits.

Reversed.

Dated this 6th day of July, 1954.

/s/ ERNEST A. TOLIN,

United States District Judge.

[Endorsed]: Filed July 6, 1954. [66]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly to be heard on the 1st day of February, 1954, before the above-entitled Court, in Courtroom 6 thereof, the Honorable Ernest A. Tolin, Judge, presiding; plain-

tiff Ralph B. Thorbus appearing by Girard F. Baker, his attorney, and defendant Oveta Culp Hobby, Secretary of Health, Education and Welfare, appearing by Laughlin E. Waters by Louis Lee Abbot, her attorney; at said time the Court ordered that briefs be filed and that after the filing of said briefs oral arguments would be heard; briefs were thereafter filed by the parties through their respective counsel, and after the filing of said briefs the matter came on again regularly to be heard in said Courtroom before said Court on April 12, 1954, before the Honorable Ernest A. Tolin, Judge, presiding, said parties appearing by their said [68] counsel, and oral argument having been made to the Court, and additional briefs having been filed with the Court, and the Court being fully advised and having rendered its written opinion and memorandum of decision and caused the same to be filed herein, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

That plaintiff, Ralph B. Thorbus, is a citizen of the United States of America, and resides in the County of Los Angeles, and in the State of California.

II.

That it is true that this action was brought to review the final decision of the Secretary of Health, Education and Welfare on the claim of Ralph B.

Thorbus for old-age insurance benefits under the Social Security Act as amended.

III.

That it is true that plaintiff was a self-employed person within the meaning and intent of the provisions of the United States Code, Title 42, Sec. 411 (Sec. 211 of Social Security Act) as amended in 1950, and that it is true that plaintiff in good faith during the years 1951 and 1952 paid the employment taxes upon his income as such self-employed person in compliance with the provisions of the U. S. Internal Revenue Code, particularly as set forth in Instruction 5, Schedule C, of Income Tax Form 1040, i.e., that it is true that for the year 1951 said plaintiff paid tax on \$3,600.00, of his taxable income of \$4,592.42, in the sum of \$81.00, and for the year 1952 said plaintiff paid tax on \$3,600.00, of his taxable income of \$3,993.46, in the sum of \$81.00, and that said payments were made to the office of the Director of Internal Revenue, at Los Angeles, California. [69]

IV.

That it is true that plaintiff during the years 1951 and 1952, and for many years prior thereto, leased from the owner thereof, The First Methodist Church of Los Angeles, certain real estate consisting of a lot and an unfurnished 72-room building thereon, and paid to the said owner of said real estate the full rental value of said real estate; that the said rental paid to said owner was listed by plaintiff as, and deducted as, an operating expense on Schedule

C of Form 1040, of the Department of Internal Revenue filed with the Director of Internal Revenue in Los Angeles, for the aforesaid years on or before March 15, 1952, and on or before March 15, 1953, respectively, in determining plaintiff's taxable income; that no part of plaintiff's taxable income which is the basis of plaintiff's claim was derived from rental of real estate and the whole thereof was derived from services furnished by him to his guests in rooms and apartments furnished, maintained and serviced by him.

V.

That it is true that plaintiff serviced the 72 rooms in said building and supplied hotel-like services to the guests; that in addition to supplying heat, light and janitorial services of a maintenance and custodial nature, plaintiff supplied additional services of a type primarily for the convenience of the guests, some of which were as follows:

1. Plaintiff was on duty in said building on a 24-hour-a-day basis, and in addition he provided a manager and desk clerk who worked on a full-time basis and on whose salary plaintiff paid Social Security and other taxes, and whose duties included taking care of the various needs of the guests, as is the custom of such an employee in a hotel, including among other things, receiving and sorting mail, taking messages for guests and telephone service; he and his employee directed callers to the [70] proper apartment of a guest;

2. He supplied linen such as sheets, pillow cases and towels for the guests and provided for laundering of same. Plaintiff made a charge for the laundering, the receipts from which were declared and included as part of the income upon which his claim is based;

3. Plaintiff provided telephones on each of the floors of the building and the manager or he himself would answer the telephone calls and call the guests to the telephone by means of a buzzer system. Telephone calls to which the plaintiff or the manager would call guests on some days numbered as many as 100;

4. He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests;

5. He provided gas cooking stoves and paid all the utilities charges in connection with the use of same;

6. He maintained a workshop on the premises and a storeroom for tools and supplies and provided all of the repairs and work necessary to maintain the apartments such as plumbing, repair of paper shades, stove repairs, carpets, and repairs to electrical wiring and equipment, all primarily for the convenient occupancy of and upkeep of the rooms or facilities occupied by the guests;

He did regular renovating of the apartments,

painting and cleaning them. He also showed apartments to prospective tenants;

7. He maintained a rubbish barrel on each floor of the building into which tenants deposited refuse, and he or his employee would carry such rubbish to the back of the building where it was picked up by a rubbish collector employed by plaintiff on a contract basis, the same method of collection was also afforded for cans and garbage;

8. He provided complete laundry facilities for all guests, including tubs, clotheslines and electric [71] irons;

9. He supplied dishes and cooking utensils and utilities for all guests;

10. He provided for the sorting and placing of guests' mail in individual mail boxes.

That most of the guests paid their bills on a weekly basis, a few on a daily basis, but it is not true that some paid on a monthly basis.

VI.

That it is true that Account No. 548-24-2990 was issued to plaintiff and the payments made under the provisions of the Social Security Act as amended were carried for the benefit of plaintiff under the aforementioned Act under said number.

VII.

That it is true that plaintiff is over the age of sixty-five (65) years; that said owner of said real

estate sold the same and plaintiff's lease was terminated and his operations closed in January, 1953.

VIII.

That it is true that on February 25, 1953, plaintiff filed with the Department of Health, Education and Welfare, Social Security Administration, an application for old-age insurance benefits under the Social Security Act as amended, which application was disallowed by the Bureau of Old Age and Survivors Insurance of the Social Security Administration on April 1, 1953; that pursuant to plaintiff's request for hearing before a referee a hearing was granted before Referee John L. Landfair, on June 10, 1953, and pursuant to the latter's decision dated July 9, 1953, plaintiff's application was further disallowed; that plaintiff's request for review by the Appeals Council of said Department of Health, Education and Welfare was denied, said notice being dated September 22, 1953. [72]

IX.

That it is true that Exhibits "A" and "B" as attached to plaintiff's complaint herein are, respectively, true copies of said Referee's decision and of the letter advising plaintiff of the denial by the Appeals Council of his request for review thereof and of the denial of plaintiff's claim for review; that it is true that plaintiff had exhausted his administrative remedies without relief.

X.

That it is true that plaintiff's services rendered in the operation of his business were services rendered

primarily for the comfort and convenience of his guests, and not of a merely custodial or maintenance nature; that it is true that plaintiff's income was not derived from rentals from real estate but was derived from services rendered by him as a self-employed person and was net earnings from self-employment, and that plaintiff was a self-employed person within the intent and provisions of the Social Security Act and of the Regulations of the Secretary of the Department of Health, Education and Welfare; and that it is true that plaintiff is entitled to old-age benefits as provided under said Act.

XI.

That the decision of Referee John L. Landfair, a review of which was denied by the Appeals Council of the Department of Health, Education and Welfare, and therefore adopted as the said Appeals Council decision and therefore under the regulations and practice of the Social Security Administration became the final decision of the defendant, was not supported by substantial evidence.

XII.

That it is true that said referee made no separate findings [73] of fact; that the decision of said referee was a confused mixture of findings of fact and conclusions of law.

XIII.

That it is true that the said referee accepted the testimony of plaintiff and the documentary evidence submitted by plaintiff to him as true, but that said

referee drew erroneous conclusions therefrom contrary to the facts and the law.

XIV.

That it is true that plaintiff intended to do, and did, bring this action under Section 205 (g) of the Social Security Act as amended to obtain judicial review of a "final decision" of the Secretary of Health, Education and Welfare, holding that plaintiff was not entitled under the Act of old-age insurance benefits for which he had filed application.

Conclusions of Law

As conclusions of law, from the foregoing Findings of Fact, the Court Finds:

I.

That plaintiff was a self-employed person within the meaning of the Social Security Act as amended, had more than six quarters of coverage thereunder, is a fully insured individual under said Act, and is entitled to old-age insurance benefits as such commencing with the month of March, 1953.

II.

That the decision of the defendant and her subordinates in the Department of Health, Education and Welfare, is not supported by substantial evidence and should be reversed. [74]

III.

That plaintiff is entitled to a judgment and order requiring defendant and her subordinates in said

Department of Health, Education and Welfare, to recognize plaintiff as a fully insured individual under the Social Security Act as amended to determine the amount of moneys which plaintiff is entitled to receive each month as such fully secured individual, and to cause payments to be made to plaintiff in said amounts as so determined commencing with the month of March, 1953, together with plaintiff's costs and disbursements incurred in this action.

Let judgment be entered accordingly.

Done in open court this 10th day of August, 1954.

/s/ ERNEST A. TOLIN,
United States District Judge.

Receipt of Copy acknowledged.

Lodged July 29, 1954.

[Endorsed]: Filed August 12, 1954. [75]

In the United States District Court in and for the
Southern District of California, Central Division

No. 16,010-T

RALPH B. THORBUS,

Plaintiff,

vs.

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Defendant.

JUDGMENT

The above-entitled cause came on regularly to be heard on the 1st day of February, 1954, before the above-entitled Court, in Courtroom 6 thereof, the Honorable Ernest A. Tolin, Judge, presiding; plaintiff Ralph B. Thorbus appearing by Girard F. Baker, his attorney, and defendant Oveta Culp Hobby, Secretary of Health, Education and Welfare, appearing by Laughlin E. Waters by Louis Lee Abbott, her attorney; at said time the Court ordered that briefs be filed and that after the filing of said briefs oral arguments would be heard; briefs were thereafter filed by the parties through their respective counsel, and after the filing of said briefs the matter came on again regularly to be heard in said Courtroom before said Court on April 12, 1954, before the Honorable Ernest A. Tolin, Judge, presiding, said parties appearing by their said [77] counsel, and oral argument having been made to the Court, and additional briefs having been filed with

the Court, and the Court being fully advised and having rendered its written opinion and memorandum of decision and caused the same to be filed herein, and having made and filed herein its written Findings of Fact and Conclusions of Law,

Now Therefore, by reason of the law and the Findings of Fact aforesaid, it is Ordered, Adjudged and Decreed as follows, to wit:

First: That the final decision of the Secretary of Health, Education and Welfare, in which it was determined that the plaintiff herein was not entitled to old-age insurance benefits be, and the same is hereby, reversed;

Second: That plaintiff was a self-employed person within the meaning of the Social Security Act as amended, had paid the self-employment tax required for the years 1951 and 1952, being more than six quarters thereunder; that prior to the 1st day of March, 1953, plaintiff was a fully insured person under said Act and prior to said 1st day of March, 1953, became, and was, ever since has been, and now is entitled to the full old-age insurance benefits provided in said Act for a fully insured person;

Third: That defendant and her subordinates in the Department of Health, Education and Welfare be, and they are hereby, and each of them is hereby, directed, ordered and required to forthwith determine the monthly old-age insurance benefits to which plaintiff is entitled under the Social Security Act as amended as a fully insured individual there-

under, and cause the same to be paid to plaintiff commencing with the month of March, 1953, and thereafter;

Fourth: That plaintiff do have and recover of and from defendant his costs and disbursements incurred in this action.

Done in open court this 10th day of August, 1954.

/s/ ERNEST A. TOLIN,

United States District Judge.

Receipt of Copy acknowledged.

Lodged July 29, 1954.

[Endorsed]: Filed August 12, 1954. [78]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given That Oveta Culp Hobby, Secretary of Health, Education and Welfare, the defendant in the above-entitled action, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Judgment entered in this action on August 12, 1954.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

MARVIN ZINMAN,

Assistant U. S. Attorney;

/s/ MARVIN ZINMAN,

Assistant U. S. Attorney,

Attorneys for Defendant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 30, 1954. [80]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL

On application of the defendant ex parte, the Court being fully advised, and for good cause shown, hereby orders that the time for filing the Record on Appeal with the United States Court of Appeals for the Ninth Circuit, and for docketing therein the appeal taken by defendant by Notice of Appeal filed August 30, 1954, is extended to November 8, 1954, pursuant to Rule 73(g) of the Federal Rules of Civil Procedure.

Dated: October 8, 1954.

/s/ ERNEST A. TOLIN,

United States District Judge.

[Endorsed]: Filed October 8, 1954. [85]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 85, inclusive, contain full, true and correct copies of Names and Addresses of Attorneys; Complaint; Answer to Complaint, Memorandum of Decision; Objections to Plaintiffs Proposed Findings of Fact; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Designation of Contents of Record on Appeal; Order Extending Time for Filing Record and Docketing Appeal, transmitted herewith, constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court, this 2nd day of November, 1954.

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 14,575. United States Court of Appeals, for the Ninth Circuit. Oveta Culp Hobby, Secretary of Health, Education and Welfare, Appellant, vs. Ralph B. Thorbus, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 3, 1954.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

C.A. No. 14,575

OVETA CULP HOBBY, Secretary of Health,
Education and Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL

Appellant intends to rely upon the following
points on appeal of the above-entitled cause:

I.

The District Court erred in reversing the administrative findings when the administrative decision was supported by substantial evidence.

II.

The District Court erred in its construction of the "rentals from real estate" exception to the Social Security laws.

III.

The District Court erred in failing to give sufficient weight to the administrative regulation as a reasonable interpretation of the "rentals from real estate" exception to the Social Security laws.

IV.

The District Court erred in determining that plaintiff was a self-employed person within the meaning of the Social Security Act as amended and was thereby entitled to Old-Age Insurance Benefits provided in said Act.

V.

The District Court erred in granting judgment to plaintiff.

VI.

The District Court erred in awarding costs to the plaintiff in a suit against the administrator.

LAUGHLIN E. WATERS,
United States Attorney;

MAX F. DEUTZ,
Assistant U. S. Attorney,
Chief of Civil Division;

/s/ MARVIN ZINMAN,
Assistant U. S. Attorney,
Attorneys for Appellant.

[Endorsed]: Filed November 9, 1954.

**In the United States Court of Appeals
for the Ninth Circuit**

**OVETA CULP HOBBY, SECRETARY OF HEALTH, EDUCATION
AND WELFARE, APPELLANT**

v.

RALPH B. THORBUS, APPELLEE

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION**

BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney.

**SAMUEL D. SLADE,
RICHARD M. MARKUS,**
Attorneys, Department of Justice.

FILED

JAN 26 1955

**PAUL P. O'BRIEN,
CLERK**

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**In the United States Court of Appeals
for the Ninth Circuit**

No. 14575

OVETA CULP HOBBY, SECRETARY OF HEALTH, EDUCATION
AND WELFARE, APPELLANT

v.

RALPH B. THORBUS, APPELLEE

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL
DIVISION*

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered on August 12, 1954, by the District Court for the Southern District of California, Central Division, reversing the decision of the Secretary of Health, Education, and Welfare that appellee was not entitled to old age insurance benefits (R. 86). The suit was brought by the appellee on November 4, 1953, to review the determination of the Department of Health, Education, and Welfare that appellee's income was derived from "rentals from real estate" and was therefore not within the self-employment provisions of the Social Security Act.

After reviewing the administrative record, the District Court made findings of fact and conclusions of law and entered judgment for appellee. The jurisdiction of the District Court was founded upon Section 205(g) of the Social Security Act. 53 Stat. 1370, as amended, 42 U. S. C. 405(g). This Court's jurisdiction is invoked under 28 U. S. C. 1291.

STATEMENT OF THE CASE

On February 25, 1953, appellee filed an application for old age insurance benefits with the Social Security Administration in which he stated that the basis of his claim was income as a self-employed person from the operation of an apartment house (R. 51-52). He attached copies of his 1951 and 1952 self-employment tax returns, each of which indicated that his annual income exceeded \$3600, the maximum amount subject to self-employment taxes (R. 53-55). In a statement accompanying the application, appellee described at length the nature of his self-employment, and enumerated services which he claimed he had performed for the tenants in his apartments (R. 58-59).

On April 1, 1953, the Bureau of Old Age and Survivors Insurance of the Social Security Administration notified appellee that his claim for benefits had been denied on the ground that he had not had six calendar quarters coverage as required by the Social Security Act (R. 64-65). The reason for disallowance of appellee's claim was clearly set forth at the end of the letter where it was stated, "it has been determined that your income in 1951 and 1952 was income from real estate rentals and not self-employment income." After receipt of the notice of disallowance of his claim, on April 17, 1953, appellee filed a request for hearing by a referee

in accordance with the provisions of the Social Security Act (R. 41-42). The hearing which was scheduled for June 10, 1953, was to determine "whether the claimant had net earnings from self-employment for the period January 1, 1951, to January 19, 1953," which question would be resolved on concluding "whether claimant's income from operation of an apartment house was excluded from 'net earnings of self-employment' as rentals from real estate" (R. 39-40). In a letter to the referee, prior to the hearing, appellee restated the circumstances of his self-employment, once again particularizing the services which he claimed to have performed for his tenants (R. 66-68).

A summary of the testimony at the hearing (R. 43-50) is as follows: For the twenty-two years preceding his claim for retirement benefits, appellee had leased an apartment house from the First Methodist Church of Los Angeles and had in turn leased the thirty-seven apartments contained therein to various tenants. The rentals in this building, the Knickerbocker Apartments, ran from \$4.00 to \$6.50 per week. Each apartment was completely furnished and was provided with a stove, an ice box, cooking and eating utensils, brooms, etc. The rental included the cost of heat and utilities but it did not include the cost of ice which the individual tenants obtained from an ice man each day. On the back porch on each floor were rubbish barrels in which the tenants could discard trash and garbage.

Appellee further testified that he and his sole employee, a housekeeper, took care of the office, showed apartments to prospective new tenants, and exchanged soiled linens for laundered linens for those tenants who wished to do so at a charge equal to the cost of launder-

ing. Although he occasionally cleaned and renovated apartments between tenancies, neither he nor his housekeeper ever cleaned the inside of the apartments or provided any interior services during tenancies.

In his unsworn letter to the referee, to which he made reference during his testimony, appellee listed certain other services provided (R. 67-68). He stated that telephones were available to the tenants on each floor and that tenants were summoned to answer telephone calls by a buzzer system, that he maintained a workshop and a store room for tools and supplies, that he made certain repairs in plumbing, wiring, etc., that he provided newspapers and magazines in a main lobby, that he cleaned the porches and steps in front of the building and the alley in the rear of the building, and that he provided wash lines and laundry facilities for the tenants. He also mentioned that a manager in the lobby answered telephones and inquiries, but he did not make clear whether he or his sole employee, the housekeeper, was that manager.

On the basis of this evidence, the referee decided that "the rentals continued to be excluded [from coverage] as rentals from real estate" (R. 38). Thereupon appellee filed a request for review of the referee's decision by the appeals council and attached an affidavit setting forth substantially the same facts as presented to the referee but providing slightly greater detail (R. 30-33). When the request for review was denied by the appeals council (R. 25-26), appellee brought this action in the District Court for the Southern District of California pursuant to Section 205(g) of the Social Security Act. The District Court took no new evidence except for a stipulation that appellee had in fact paid to the Government the sum of \$81.00 in 1951 and 1952, purportedly as

self-employment taxes. After hearing argument on the meaning of the "rentals from real estate" exception to the self-employment provisions of the Social Security Act and the administrative regulations relating thereto, the District Court concluded that the administrative finding was erroneous and granted judgment for appellee. The court set forth the reasons for its decision in a Memorandum of Decision (R. 69-76), made findings of fact and conclusions of law (R. 76-85), and ordered the Department of Health, Education, and Welfare to commence payment of old age insurance benefits to appellee in March, 1953 (R. 85).¹ The Court further ordered that appellee recover from the Secretary his costs and disbursements incurred in the action.

QUESTIONS PRESENTED

1. Whether Section 404.1052(a) of Social Security Administration Regulation No. 4 is a valid interpretation of the "rentals from real estate" exception of the Social Security laws as provided in Section 211 of the Social Security Act.

2. Whether the finding of the Administrator that appellee had derived his income from "rentals from real estate" was supported by substantial evidence.

3. Whether, in the absence of statutory authorization, costs can be imposed upon the Administrator sued in her official capacity.

STATUTE AND REGULATION INVOLVED

Section 211(a) of the Social Security Act and Section 404.1052 of Social Security Regulation 4, whose interpretation and application are here involved, are

¹ Though the amount of such benefits does not appear in the record, reference to the Act indicates that \$98.50 per month would be paid to appellee if the present judgment were upheld. 68 Stat. 1064, revising 42 U.S.C. 415.

set forth below in pertinent part. Additional sections of the Social Security Act which are relevant to this appeal are printed in the Appendix, *infra*, pp. 22-26.

Section 211(a) [64 Stat. 502, 42 U.S.C. 411(a)]:

The term "net earnings from self-employment" means the gross income, as computed under chapter 1 of Title 26, derived by an individual from any trade or business carried on by such individual, less the deductions allowed under such chapter which are attributable to such trade or business, plus his distributive share (whether or not distributed) of the ordinary net income or loss, as computed under section 183 of Title 26, from any trade or business carried on by a partnership of which he is a member; except that in computing such gross income and deductions and such distributive share of partnership ordinary net income or loss—

(1) There shall be excluded rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto, unless such rentals are received in the course of a trade or business as a real estate dealer; * * *

Section 404.1052 [16 Fed. Reg. 13074, 20 C.F.R. 404.1052] Income excluded from net earnings from self-employment.—For the purpose of computing net earnings from self-employment, the gross income derived by an individual from a trade or business carried on by him, the allowable deductions attributable to such trade or business, and the individual's distributive share of the ordinary net income or ordinary net loss from any trade or busi-

ness carried on by a partnership of which he is a member shall be computed in accordance with the following special rules:

(a) *Rentals from real estate*.—Rentals from real estate (including personal property leased with the real estate), and the deductions attributable thereto, unless such rentals are received by an individual in the course of a trade or business as a real estate dealer, are excluded. * * *

Payments for the use or occupancy of entire private residences or living quarters in duplex or multiple-housing units are generally rentals from real estate. Except in the case of real estate dealers, such payments are excluded in determining net earnings from self-employment even though such payments are in part attributable to personal property furnished under the lease.

Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages, do not constitute rentals from real estate; consequently, such payments are included in determining net earnings from self-employment. Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service;

whereas, the furnishing of heat and light, the cleaning of public entrances, exits, stairways and lobbies, the collection of trash, and so forth, are not considered as services rendered to the occupant.

Except in the case of a real estate dealer, where an individual or a partnership is engaged in a trade or business the income of which is classifiable in part as rentals from real estate, only that portion of such income which is not classifiable as rentals from real estate, and the expenses attributable to such portion, will be included in determining net earnings from self-employment.

SPECIFICATION OF ERRORS

1. The District Court erred in reversing the administrative finding when the administrative decision was supported by substantial evidence.

2. The District Court erred in its construction of the "rentals from real estate" exception to the Social Security laws upon which it based its judgment.

3. The District Court erred in failing to give sufficient weight to the administrative regulation as a reasonable interpretation of the "rentals from real estate" exception to the Social Security laws.

4. The District Court erred in determining that plaintiff was a self-employed person within the meaning of the Social Security Act, as amended, and was thereby entitled to Old Age Insurance Benefits provided in said Act.

5. The District Court erred in granting judgment to plaintiff.

6. The District Court erred in assessing costs against the Administrator in the absence of statutory authority therefor.

I

The objections raised in this appeal are that the District Court did not employ the proper criteria for determining whether income is "rentals from real estate," excluded from self-employed income by Section 205(g) of the Social Security Act, that it failed to give sufficient weight to the Secretary's determination that plaintiff's income was derived from such rentals, and that as a part of its judgment it improperly assessed costs against the Secretary. The correct interpretation of the statutory exception, we submit, is incorporated in the governing administrative regulation. That regulation, which was referred to but not clearly applied by the District Court, establishes that the rendering of numerous personal services to the occupants of multiple housing units changes the character of such rentals and removes them from this statutory exception, while the performance of services which are customarily rendered in the general operation of the building, though they may also be for the tenants' convenience, do not alter the nature of the income or entitle the landlord to Social Security Benefits. The District Court, on the other hand, seems to have considered the "rentals from real estate" exception applicable only in cases of passive receipt of income accompanied by minimal maintenance services. The regulation, whose validity was never challenged by appellee, appears to be perfectly consistent with the statutory language and is therefore a binding interpretation of the statute. It is supported, for example, by the fact that it was copied in large part from the reports of Congressional Committees leading to the enactment of the statutory section involved.

II

Although the District Court should have limited its review to a determination of whether the Administrator's decision was supported by substantial evidence in the administrative record, it appears that a much broader review was made. We suggest, however, that upon proper review the administrative finding should be upheld as clearly supported by substantial evidence. A comparison of the services provided by appellee with those considered in the regulation to be a basis for removing rentals from the statutory exception demonstrates that appellee was, in fact, deriving his income from "rentals from real estate."

III

In addition to the above errors the District Court allowed the plaintiff to recover costs in spite of the fact that, under well-established principles, costs cannot be taxed to the Administrator in a suit brought against her in her official capacity.

ARGUMENT

I

The District Court Erred in Applying a Standard for Determining Whether Appellee's income Was Derived from "Rentals from Real Estate" Which Differed from the Standard Set Forth in the Administrative Regulation.

Appellee is entitled to social security benefits only if it is demonstrable that he had six calendar quarters of coverage and is therefore "a fully insured individual." His claim was founded upon amounts paid by him as self-employment taxes for 1951 and 1952 for income from the operation of a 37-unit apartment house; it was rejected by the Social Security Administration on

the ground that the income involved represented rentals from real estate, which are excluded from self-employment income by Section 211 of the Social Security Act,² set forth, *supra*, p. 6. That determination, which was based on an application of Section 404.1052(a) of Social Security Regulation 4,³ was overturned by the District Court apparently applying a different standard. In so doing, we submit, the district court committed error since the administrative regulation governs the interpretation of this section of the Act.

Section 211 defines net earnings from self-employment so as to exclude "rentals from real estate (including personal property leased with the real estate) and deductions attributable thereto." The Act makes no further definition of the phrase "rentals from real estate," but Section 205(a) of the Act⁴ empowers the Administrator "to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions." Where there is no statutory authority for administrative regulations, the contemporaneous interpretation of the statute administered by that agency is given great weight. *Skidmore v. Swift & Co.*, 323 U. S. 134; *United States v. American Trucking Ass'ns*, 310 U. S. 534. On the other hand, when the statute authorizes the issuance of administrative regu-

² 64 Stat. 502, as amended, 42 U.S.C. 411. The same definition is incorporated in the Internal Revenue Code in the self-employment tax section. 26 U.S.C. 481(a). The new code merely renumbers this section I.R.C. (1954) § 1402.

³ 16 Fed. Reg. 13074, 20 C.F.R. 404.1052, set forth, in pertinent part, *supra*, at pp. 6-8.

⁴ 53 Stat. 1368, as amended, 42 U.S.C. 405(a), *infra*, p. 22. Regulations are also authorized under Section 1102, 49 Stat. 647, as amended, 42 U.S.C. 1302.

lations, the regulations are not only given great weight but are given the force of the statute, itself, unless they are unreasonable or inconsistent with the express language of the Act. See *Fawcus Machine Co. v. United States*, 282 U. S. 375, 378; *Atchison, T. & S. F. Ry., v. Scarlett*, 300 U. S. 471, 477; *Forbes v. United States*, 125 F. 2d 404, 409 (C. A. 9); *Roberts v. Commissioner*, 176 F. 2d 221, 223 (C. A. 9). Since Section 205(a) does authorize the issuance of regulations for the implementation of this Act, Social Security regulations have generally been treated as having such binding significance. *E. g.*, *United States v. Lalone*, 152 F. 2d 43 (C. A. 9).

Nor can the validity of Section 404.1052(a) of Social Security Regulation 4 be reasonably challenged on the ground that it contradicts the statute. Rentals of real property and associated personalty could be interpreted to include hotel accommodations, boarding house rooms, parking lot space, warehouse storage, or automobile garage stalls. However, each of these types of rentals is excepted from the regulation's definition of such rentals; thus, if the regulation fails to restate the proper meaning of Section 211, it errs on the side of liberality to claimants. Moreover, the propriety of the regulatory interpretation is further emphasized by the fact that a large portion of the regulation is an almost verbatim copy of language used to describe the effect of Section 211 in the House and Senate Reports leading to its enactment. See Sen. Rept. No. 1669, 81st Cong., 2d Sess. 156; H. R. Rept. No. 1300, 81st Cong., 1st Sess. 137.

Payments for the use or occupancy of entire private residences or living units in duplex or multiple-

housing units are generally rentals from real estate. Except in the case of real estate dealers, such rentals are excluded under paragraph (1), even though in part attributable to personal property furnished under the lease. On the other hand, payments for the use or occupancy of rooms or other space, where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services, or in tourist camps or tourist homes, or for the use or occupancy of space in parking lots, warehouses, or storage garages do not constitute rentals from real estate.

The only significant addition to the above language, made by the regulation, was the suggestion of some services which would cause income to be removed from this excluded category. Surely this attempt to define by example does not render the regulation invalid when those examples reasonably follow from the language of the statute and its legislative history.

Finally, it is important to note wherein the District Court's standard differed from the regulation. In its third finding of fact (R. 78) and its first conclusions of law (R. 84), the court indicated that the basis of its decision was the bare statutory provision without regard to the interpreting regulation, yet nowhere was a finding made that the regulation is unreasonable or inconsistent with the statute. Its tenth finding^s of fact (R. 82-83) indicates that the District Court would not classify income as rentals where the claimant can show that some "services rendered in the operation of his business were services rendered primarily for the comfort and convenience of his guests, and not of a merely

custodial or maintenance nature.” The regulation, on the other hand, contrasts services rendered “primarily for his [*i.e.*, the tenant’s] convenience,” with services “customarily rendered in connection with the rental of rooms or other space for occupancy only.” To further explain this distinction the regulation suggests that maid service is an example of the former while the cleaning of areas outside the rented rooms is an example of the latter. In other words, to be sufficient to remove income from the rental classification, services must be of a personal nature to the tenants and relate more closely to individual lessees than to the general operation of the establishment. Some factors which could aid in this classification process might be the frequency of the services, the locale of their performance (within or without the leased premises), the servile nature of the acts, and the control of the individual tenant over the manner of performance. Such a standard appears to differ substantially from the “merely maintenance” rule applied by the District Court.

In its Memorandum of Decision, the court set forth the regulation, but proceeded to construe it as supporting its own construction of Section 211. We submit that it was error not to defer to the administrative interpretation of its own regulation when such a construction was not unreasonable. Cf. *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410; *Porter v. Crawford & Doherty Foundry Co.*, 154 F. 2d 431 (C. A. 9), certiorari denied, 329 U. S. 720. The test applied in the Memorandum of Decision is made clear by the statement that the factors considered significant by the Court “all inescapably leave the conclusion that plaintiff was not merely a receiver of rentals from real estate, but rather,

that he conducted a business on the premises, offering not only apartment facilities, but also many services to the occupants of the building" (R. 76). Certainly this standard of passive receipt of income differs substantially from the test outlined in the regulation, where such services as the cleaning of public stairways and lobbies and the collection of trash are expressly stated to be insufficient to remove income from the "rentals from real estate" classification.

II

The District Court Erred in Reversing the Administrative Finding Which, under the Proper Criteria for Determining Coverage, Was Clearly Supported by Substantial Evidence.

Section 205(g) of the Act,⁵ which was the basis for the District Court's jurisdiction, carefully limits the scope of review after an administrative finding. Not only does that section provide that "[t]he findings of the Administrator as to any fact, if supported by substantial evidence shall be conclusive * * *" but it also specifies that the District Court's order shall be based "upon the pleadings and transcript of the [administrative] record." The District Court's function is thus to examine the administrative record in order to determine whether the Administrator's decision was supported by substantial evidence; the District Court is not empowered to conduct a trial *de novo* of the issues or to substitute its judgment for the Administrator's in close cases. *Thompson v. Social Security Bd.*, 154 F. 2d 204 (C. A. D. C.); *Walker v. Altmeyer*, 137 F. 2d 531 (C. A. 7); *United States v. Lalone*, 152 F. 2d 43 (C. A. 9); *Hobby v. Hodges*, 215 F. 2d 754 (C. A. 10). There is

⁵ 53 Stat. 1370, as amended, 42 U.S.C. 405(g), *infra*, pp. 23-25.

even substantial doubt whether the Court had power to make independent findings of fact, as was done in this case. Cf. *In re Chicago, M., St. P. & P. Ry.*, 138 F. 2d 433 (C. A. 7). It is the Secretary's position that the District Court, in the present case, though purporting to apply the substantial evidence rule, in fact employed a principle of much broader review and based its decision on an independent determination of the validity of appellee's claim.

In this respect, the case bears a marked resemblance to this Court's decision in *United States v. Lalone*, 152 F. 2d 43 (C. A. 9). In that proceeding the District Court had overturned an administrative finding that the claimant was not entitled to Social Security benefits on the ground that he was not an employee within the meaning of the governing regulation. On appeal, this Court reversed and clearly set forth the scope of review in these cases: ⁶

Whether Barrett & Co. was a partner or an employer of Lalone is partially a question of interpreting the applicable statutes and regulations and partially a matter of construing surrounding facts. The board's decisions interpreting the Act and regulations are entitled to weight; the board's findings of fact, if supported by substantial evidence, are conclusive. [citations omitted]

We submit that a reexamination of the administrative record (R. 23-68) will demonstrate that the Secretary's

⁶ 152 F. 2d 43, 45 (C.A. 9). The scope of review in the present case and in the *Lalone* decision can be contrasted with this Court's ruling in *Miller v. Burger*, 161 F. 2d 992 (C.A. 9), where "no genuine issue as to any material fact" was presented and the bare statutory language was being interpreted without the aid of administrative regulations.

finding, when viewed as an application of the governing regulation, is amply supported by evidence contained therein.

Although many of the facts which appellee offered as supporting his claim were seemingly irrelevant, we will attempt to restate all of them as fully as possible. In two of his letters to the board, appellee relied heavily on the fact that he was not the owner of the apartment building but was a lessee who was subleasing to his tenants. This would appear to have no significance whatever in the resolution of the present issue since the statute and regulation involved deal with the classification of income regardless of the source of the property from which that income was derived. He also claimed the great number of hours spent by him in managing the building demonstrated that his income was not rentals from real estate; however the test imposed by the regulation is the nature of the facilities and/or services for which payment was received—not the amount of effort expended by the claimant. In his letters and testimony, he referred to the following facilities which he stated were provided at the Knickerbocker Apartments: (1) gas stoves, (2) bathtubs, (3) ice boxes, (4) furniture, (5) brooms, (6) telephones, (7) dishes and cooking utensils, (8) laundry facilities (tubs, lines, clothes pins, ironing boards, irons), (9) rubbish barrels, (10) lights and carpets in the halls, (11) a lobby with magazines and newspapers, (12) individual mail boxes, (13) linens. Since the statute and the regulation both refer to “rentals from real estate (*including personal property leased with the real estate*)” [emphasis added] the significance of these facilities would seem to be expressly denied. Furthermore, it is doubtful whether any of these facilities could reasonably be termed services, let alone serv-

ices primarily for the convenience of the individual tenants, as would be necessary to avoid classifying the income derived therefrom as rentals.

Appellee also set forth, in various letters to the board and in his testimony, the following services which were performed: (1) utilities (*i. e.*, heat, light, gas, water and electricity) were furnished, (2) the public halls, porches, steps and alley behind the building were cleaned, (3) the rubbish in the rubbish barrels outside the apartments was periodically collected, (4) occasional repairs were made to rooms and facilities (though there is no indication that such repairs were made during tenancies rather than between tenancies), (5) apartments were occasionally renovated between tenancies, (6) mail was sorted into individual mail boxes in the lobby, (7) on occasion, messages were taken and callers were directed to tenants, (8) linens were exchanged at the office if the tenant would pay the cost of laundering, (9) tenants were notified of telephone calls by a buzzer system. Items (1)-(3) are disposed of by the express language and the specific examples included in the regulation. Items (4)-(7) fail to remove appellee's income from the rental classification since they are not personal or hotel-like services but are services which are often performed in the maintenance of an apartment house that is commonly considered as providing no special services to its tenants. Finally, items (8) and (9) could conceivably be classed as personal services for the tenants, although the linen exchange service was at additional cost to the tenant and was not necessarily part of his rental conditions and the buzzer notification system, which related to phones outside the tenants' rooms, may have been primarily for appellee's convenience in referring calls

rather than for his tenants' convenience in receiving them.

The decision of the Administrator was strongly supported, on the other hand, by appellee's testimony that neither he nor his sole employees ever entered a rented apartment to clean it during a tenancy (R. 47, 48) and that the tenants were obliged to obtain such necessities as ice for their ice boxes without assistance by appellee (R. 46). Presented with the above evidence and an opportunity to examine appellee in a manner which enabled him to determine the credibility of appellee's testimony,⁷ the referee concluded that the services performed were not sufficient to remove appellee's income from the rental classification. It is difficult, if not impossible, at this stage of the proceedings to obtain any insight into the reliability of appellee's statements or their full meaning; only the referee who heard the testimony was in a position to evaluate such non-evidentiary factors. But it is possible here to determine, as we con-

⁷ The District Court relied upon the failure of the referee to expressly state in his written decision that any of appellee's statement was disbelieved as proof that all were believed. That conclusion appears to be without merit, particularly since the referee listed the services which he considered appellee had rendered and that list did not include several of the claimed facilities and services. The referee summarized his understanding of the facts as follows (R. 10):

"It appears that the claimant furnished units and janitorial services for rent to the public. He furnished the apartment units including linens, but required the tenants to pay for the laundering of the linens. No personal services were furnished the tenants within the individual units other than repairs and painting as necessary for occupancy. The claimant leased the apartment from the First Methodist Church, of Los Angeles, California, at a definite monthly rental. The claimant rents out the units and provides utilities to the tenants for definite rentals by the week."

tend, that the referee was supported by substantial evidence in his finding.⁸

III

The District Court Erred in Awarding Costs Against the Administrator

It is well established that neither the United States nor its administrative agencies can be taxed interest or costs in the absence of statutory consent. See *e. g.*, *Stanley v. Schwalby*, 162 U. S. 255, 272; *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 20; *United States v. Worley*, 281 U.S. 339, 344. This rule which relates equally well to an Administrator sued in his official capacity is codified in 28 U. S. C. 2412(a). In *Ewing v. Gardner*, 341 U. S. 321, the Supreme Court specifically applied it to the Federal Security Administrator, the predecessor of the present defendant. Therefore the assessment of costs against this defendant, regardless of the decision on the merits of the case, was clear error.

⁸ A large number of the facilities and services provided were not special services to the occupants since they were required by fire, safety, and sanitation laws. See, *e.g.*, *Los Angeles Municipal Code*, Section 32.00 (person managing apartment house must clean all areas which he controls), Section 57.47 (person managing apartment house must light hallways and stairways at night), Section 57.24 (person having charge of building must dispose of all inflammable materials and store in incombustible receptacles), Section 66.02 (manager of apartment house must provide portable receptacles for garbage, must clean same, and must make accessible for removal), Section 39.04 (person having charge of premises shall not permit accumulation of garbage), Section 96.100 (buildings must be maintained in safe condition), Section 96.112 (unsafe buildings must be repaired if possible). It is also interesting to note that the basis of distinction between apartments and hotels afforded by the ordinances of Los Angeles is that an apartment house provides cooking facilities while a hotel need not necessarily do so. Compare Los Angeles Municipal Code Section 12.000 ("apartment") with *id.* ("hotel").

CONCLUSION

For the above reasons, we respectfully submit that the judgment of the District Court should be reversed and the case remanded with instructions to enter judgment for appellant, or if this Court should affirm the District Court's ruling as to the merits, that the case be remanded with instructions to delete the award of costs.

WARREN E. BURGER,
Assistant Attorney General.

LAUGHLIN E. WATERS,
United States Attorney.

SAMUEL D. SLADE,
RICHARD M. MARKUS,
Attorneys, Department of Justice.

APPENDIX

The Social Security Act, provides, in pertinent part, as follows:

Section 202(a) [49 Stat. 623, as amended, 42 U.S.C. 402(a)]:

Every individual who—

(1) is a fully insured individual (as defined in section 414(a) of this title),

(2) has attained retirement age (as defined in section 416(a) of this title), and

(3) has filed application for old-age insurance benefits,

shall be entitled to an old-age insurance benefit for each month, beginning with the first month after August 1950 in which such individual becomes so entitled to such insurance benefits and ending with the month preceding the month in which he dies. Such individual's old-age insurance benefit for any month shall be equal to his primary insurance amount (as defined in section 415(a) of this title) for such month.

* * * * *

Section 205(a) [53 Stat. 1368, as amended, 42 U.S.C. 405(a)]:

The Administrator shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this subchapter, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking

and furnishing the same in order to establish the right to benefits hereunder.

Section 205(b) [53 Stat. 1368, as amended, 42 U.S.C. 405(b)]:

The Administrator is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this subchapter. Whenever requested by any such individual or whenever requested by a wife, widow, former wife divorced, husband, widower, child, or parent who makes a showing in writing that his or her rights may be prejudiced by any decision the Administrator has rendered, he shall give such applicant and such other individual reasonable notice and opportunity for a hearing with respect to such decision, and, if a hearing is held, shall, on the basis of evidence adduced at the hearing, affirm, modify, or reverse its findings of fact and such decision. The Administrator is further authorized, on his own motion, to hold such hearings and to conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this subchapter. In the course of any hearing, investigation, or other proceeding, he may administer oaths and affirmations, examine witnesses, and receive evidence. Evidence may be received at any hearing before the Administrator even though inadmissible under rules of evidence applicable to court procedure.

* * * * *

Section 205(g) [53 Stat. 1370, as amended, 42 U.S.C. 405(g)]:

Any individual, after any final decision of the Administrator made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Administrator may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of its answer the Administrator shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a rehearing. The findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Administrator or a decision is rendered under subsection (b) of this section which is adverse to an individual who was a party to the hearing before the Administrator, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the

court shall review only the question of conformity with such regulations and the validity of such regulations. The court shall, on motion of the Administrator made before it files its answer, remand the case to the Administrator for further action by the Administrator, and may, at any time, on good cause shown, order additional evidence to be taken before the Administrator, and the Administrator shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

* * * * *

Section 214(a) [64 Stat. 505, 42 U.S.C. 414(a)]:

* * * * *

(2) In the case of any individual who did not die prior to September 1, 1950, the term “fully insured individual” means any individual who had not less than—

(A) one quarter of coverage (whether acquired before or after such day) for each two of the quarters elapsing after 1950, or after the quarter in which he attained the age of twenty-one, whichever

is later, and up to but excluding the quarter in which he attained retirement age, or died, whichever first occurred, except that in no case shall an individual be a fully insured individual unless he has at least six quarters of coverage; * * *

Section 1102 [49 Stat. 647, as amended, 42 U.S.C. 1302]:

The Secretary of the Treasury and the Federal Security Administrator shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter.

No. 14575

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OVETA CULP HOBBY, Secretary of Health, Education and
Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

GIRARD F. BAKER, and
JOHN W. ERPELDING,
610 South Broadway,
Los Angeles 14, California,

Attorneys for Appellee Ralph B. Thorbus.

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No. 14575

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

OVETA CULP HOBBY, Secretary of Health, Education and
Welfare,

Appellant,

vs.

RALPH B. THORBUS,

Appellee.

On Appeal From the United States District Court for the
Southern District of California, Central Division.

BRIEF FOR APPELLEE.

Statement of Facts.

Appellee finds it necessary to provide this Court with his own statement of facts in order that appellee's case may be presented in its proper perspective. The statement of facts in appellant's brief is incomplete and therefore does not provide that proper perspective so far as appellee is concerned.

Appellee was plaintiff in the District Court and is hereinafter frequently referred to as plaintiff.

Plaintiff, for some twenty (20) years prior to 1950, had carried on the business of operating a rooming house

or apartment hotel in a building owned by The First Methodist Church, most of which he rented unfurnished from said church, and he had no reason to believe that he would not continue to have said business indefinitely. The plaintiff rented from the owner a portion of said building unfurnished on a month-to-month basis and paid said church the full rental value of said real estate for the use thereof, although the church reserved a portion of said building for its own use. [R. 30-31, 44, 49, 66.]

Plaintiff furnished and serviced the 72 rooms in said building and supplied hotel-like services to the guests. In addition to supplying heat, light and janitorial services of a maintenance and custodial nature, plaintiff supplied additional services of a type primarily for the convenience of the guests, some of which were as follows:

1. Plaintiff was on duty in said building on a 24-hour-a-day basis and in addition he provided a manager and desk clerk who worked on a full-time basis and on whose salary plaintiff paid Social Security and other taxes, and whose duties included taking care of the various needs of the guests, as is the custom of such an employee in a hotel, including, among other things, receiving and sorting mail, taking messages for guests and rendering telephone service as below. He and his employee directed callers to the proper apartment of a guest [R. 28, 31-32, 46-47, 66-68];

2. He supplied linen such as sheets, pillow cases and towels for the guests and provided for laundering of same. Plaintiff made a charge for the launder-

ing, the receipts from which were declared and included as part of the income upon which his claim is based [R. 31, 45-46, 68];

3. Plaintiff provided telephones on each of the floors of the building and the manager or he himself would answer the telephone calls and call the guests to the telephone by means of a buzzer system. Telephone calls to which the plaintiff or the manager would call guests on some days numbered as many as 100 [R. 31-32, 66-67];

4. He maintained a hotel-like lobby for the guests where newspapers and magazines were supplied by him for the use and convenience of the guests [R. 31-32, 66-68];

5. He provided gas cooking stoves and paid all the utilities charges in connection with the use of same [R. 31, 45, 48, 67];

6. He maintained a workshop on the premises and a storeroom for tools and supplies and provided all of the repairs and work necessary to maintain the apartments such as plumbing, repair of window shades, stove repairs, carpets, and repairs to electrical wiring and equipment, all primarily for the convenient occupancy of and upkeep of the rooms and facilities occupied and used by the guests; he did regular renovating of the apartments, painting and cleaning them. He also showed apartments to prospective guests [R. 32, 46, 67];

7. He maintained a rubbish barrel on each floor of the building into which guests deposited refuse, and he or his employee would carry such rubbish to the

back of the building where it was picked up by a rubbish collector employed by plaintiff on a contract basis, the same method of collection was also afforded for cans and garbage [R. 47-48, 68];

8. He provided complete laundry facilities for all guests, including tubs, clothes lines and electric irons [R. 32, 66-68];

9. He supplied dishes and cooking utensils and utilities for all guests [R. 32, 46-48, 66-67];

10. He provided for the sorting and placing of guests' mail in mail boxes [R. 31-32].

Most of the guests paid their bills on a weekly basis [R. 47].

The said services were listed in a letter dated June 9, 1953, presented to the Referee at the time of the hearing, and in Appellee's affidavit to the Appeals Council. Although appellant in her statement of facts refers to said letter as an unsworn statement, probably for the purpose of trying to discredit said letter (App. Br. p. 4), it is submitted that the Referee had the letter before him and gave appellee to understand that he intended to consider said letter as evidence, giving it the same creditability as if the statements had been made under oath [R. 49], where it was said: "Q. Do you think I have everything in here I need to have in this case, with that letter you gave me?" and see said affidavit of July 31, 1953 [R. 30-33].

When the Social Security Act was amended in 1950, plaintiff in good faith complied with the terms thereof and

paid the self-employment tax required by the applicable statutes during the years 1951-52 [R. 51-55, 30-31].

Then the church, the owner of the real property, sold its property and the plaintiff in 1953 at the age of 73 found himself suddenly deprived of his said means of livelihood through the business which he had developed and carried on over a period of 22 years [R. 49-50].

Pursuant to law plaintiff made application for Social Security benefits and was denied same by the Bureau of Old Age and Survivors Insurance, and further denied same after hearing before a Referee. A request for a review of the Referee's decision by the Appeals Counsel was also denied [R. 64-65, 33-38, 25-26].

After denial by the Appeals Council of plaintiff's request for a review of the referee's decision, the decision of the Referee as thus approved by the Appeals Council became the decision of the Secretary.

Pursuant to Title 42, U. S. C. A., Sec. 405g, plaintiff then commenced these proceedings in the District Court to enforce his rights under the Social Security Act.

The District Court found that there was no substantial evidence to support the decision of the Secretary, reversed the same and ordered the Department of Health, Education and Welfare to commence payment of old age insurance benefits to appellee as of March, 1953 [R. 69-85].

Summary of Argument.

Appellee respectfully submits that the decision of the District Court holding that the plaintiff had income from self-employment upon which he paid social security taxes, according to the provisions of the applicable law, and was therefore entitled to old age benefits under the law, reversing the decision of the Secretary of Health, Education, and Welfare, was unerringly correct and should be sustained for the following reasons:

1. The only possible basis for denying the benefits to plaintiff would be if his self-employment income could be classified as rentals from real estate. The provision of the law excluding income from rentals from real estate is in the nature of an exception which must be construed strictly as opposed to the remedial provisions of the Act which must be construed liberally in favor of those intended to be benefited thereby.

2. There were no questions of fact involved. The evidence is uncontradicted. The only question was of law, to-wit: Did the facts show self-employment income on the part of Appellee as a matter of law, thus entitling him to the benefits of the Old Age and Survivors Insurance Act, *or* did the facts, as a matter of law, bring Appellee within the exception of income derived from "rentals from real estate" thus excluding him from the benefits of the Act.

The District Court decided, as a matter of law, that the facts were such as to establish that the plaintiff did derive his income as a self-employed person from services rendered by him in connection with his business in the operation of a so-called rooming house or apartment hotel, and not from rentals of real estate.

Plaintiff owned no real estate and paid to the owner of the same the full rental value of the portion of the building he used in his business. This rental was deducted in determining the self-employment income upon which he paid the social security taxes and upon which his claim for benefits is based.

The services rendered by plaintiff were in nature such as are rendered in operating a low priced hotel and included services primarily for the convenient use and occupancy of the premises by the guests as well as services which were merely custodial in nature.

The statute and regulations (based on the legislative history) intended that the payments for the occupancy of rooms where services were rendered of the very type rendered by the plaintiff do not constitute rentals from real estate.

3. The law requires that the Secretary make findings of fact. None were made. The decision of the Secretary was nothing more than a conclusion of law following a recital of the applicable provisions of the law.

The only portion of the Secretary's decision which might conceivably be called findings of fact were not supported by substantial evidence nor indeed by any evidence.

If the Secretary did consider all of the evidence she then based her decision on completely erroneous conclusions of law not justified by the facts as shown by the evidence.

4. There was no substantial evidence to support the findings of the Secretary and her decision based thereon.

ARGUMENT.

POINT ONE.

The Provision of the Law Excluding Income From Rentals From Real Estate Is in the Nature of an Exception Which Must Be Construed Strictly as Opposed to the Remedial Provisions of the Act Which Must Be Construed Liberally in Favor of Those Intended to Be Benefited Thereby.

The Social Security Act was amended in 1950 in order to include self-employed persons and to broaden its scope and increase the number of persons covered and benefited thereby.

Corpus Juris Secundum (81 C. J. S., 74-75) states the law as follows:

“* * * Provisions for old age benefits were enacted in order to solve the problem of insecurity brought on by old age by providing for payments in the nature of annuities to the elderly. * * *. The Statutes providing for a system of old age benefits and for the raising of the necessary funds by certain taxes are remedial in scope, and should be liberally construed to effectuate their remedial objectives, and, hence, a liberal construction in favor of those seeking benefits is required. In other words, a construction of the statutes is required which will give effect to the intention of Congress in the light of the mischief to be corrected and the end to be obtained, * * *.” (Citing: *Carroll v. Social Sec. Board*, 128 F. 2d 876, 881 (8, 9) and many other cases.)

“The exception therefor should be strictly construed, and, at the same time, exceptions should be reasonably construed; they extend only as far as their language fairly warrants, *and all doubts should be resolved in favor of the general provision rather than*

the exception. * * * However, an exception must be construed in conformity with the purpose and meaning of the statute, and words of exception used in a statute may be expanded or limited to effectuate the manifest reason and obvious purpose of the law. * * *” (83 C. J. S. 891-893, citing many cases.) (Emphasis ours.)

The legislative history of the 1950 amendment of Section 411, Title 41, U. S. C. A. clearly bears out our contention that following the foregoing rules plaintiff is entitled to the benefits which he sought before the Department of Health, Education and Welfare, and now seeks.

Referring to said history as set forth in the 1950 U. S. Code, Congressional Service, Volume 2, at pages 3452-3460, it becomes clear that the purpose of the exception was to exclude the income to owners of real estate from rentals which they collected therefrom requiring no important activity on their part other than the collection.

On the other hand, said history shows that businesses conducted in or on real estate, such as that of plaintiff, where the one conducting it devoted practically his full time to it, as in this case, were intended to be covered by the Act and not excluded by the exception. Among other things, said history states:

“* * * *Payments for the use or occupancy of rooms or other space where services are also rendered to the occupant, such as for the use or occupancy of rooms or other quarters in hotels, boarding houses, or apartment houses furnishing hotel services* * * * do not constitute rentals from real estate.” (Emphasis ours.)

The Regulations of the Department of Health, Education, and Welfare in this same connection were based on the legislative history above quoted.

POINT TWO.

There Were No Questions of Fact Involved. The Evidence Is Uncontradicted. The Only Question Was of Law, To-wit: Did the Facts Constitute Self-employment on the Part of Appellee as a Matter of Law, Thus Entitling Him to the Benefits of the Old Age and Survivors Insurance Act, or Did the Facts, as a Matter of Law, Bring Appellee Within the Exception of "Rentals from Real Estate," Thus Excluding Him From the Benefits of the Act?

The uncontradicted evidence showed that:

Plaintiff devoted his full time to the operation of his said business, making himself available for, and rendering various services to, the guests which were primarily for their convenience.

The income included as income from self-employment in his tax returns and in his application for benefits was not received or derived from any real estate which he owned, but from occupancy of rooms which he furnished and equipped, and from services which he rendered to the guests.

It is true that in the operation of his business, from which was derived the income which he returned and claims as income from self-employment, he used real estate belonging to another but the full market value thereof was paid to the owner and deducted in determining the self-employment income upon which the taxes paid were based.

Plaintiff rented rooms to guests in a manner similar to a hotel or rooming house. From the payments he received from the guests he had to pay his operating ex-

penses which included a monthly payment to the landowner for the full rental value of the real estate. It is obvious therefore when plaintiff paid the landowner the full rental value of the realty that what he retained was the value of and payment for his services. When making his self-employment income return plaintiff excluded the rental value of the real estate before determining the self-employment income. It therefore, logically follows that no part of his said income was derived from real estate rentals but was derived solely from services.

Unquestionably if the plaintiff had been engaged by the owner of the real property to perform the same services as an employee as he rendered as a self-employed person the requisite taxes would have had to be withheld by his employer and the plaintiff would have been entitled to receive benefits under the Act. This is the type of situation which the 1950 amendment to the statute is designed to meet, that is, eliminating the possibility that a self-employed person rendering services practically identical to those rendered by an employed person be denied benefits under the statute while the employed person received the benefits.

If, however, notwithstanding the foregoing, the Court should desire to know the specific services rendered by Plaintiff in order to determine if such services are sufficient to constitute the income therefrom self-employment income rather than rentals from real estate the plaintiff respectfully submits the following, which is likewise uncontradicted.

The plaintiff, in the operation of his rooming house did, of course, render services such as providing heat and light, the cleaning of public entrances, exits, stairways, and

lobbies, the collection of trash, etc., as the Secretary recognized.

However, the question here *is* what additional services were rendered by plaintiff which were sufficient to show the payments to be income of the business in which appellee was self-employed rather than being included in the classification of rentals from real estate, *not* which services are *insufficient* to change the character of the payments from rentals from real estate (which reverse approach apparently was the manner of approach to the problem by the Secretary, as will be pointed out later in this brief).

Section 404.1052 of Social Security Regulation 4 (16 Fed. Reg. 13074, 20 C. F. R. 404.1052) reads in part as follows:

*"Generally, services are considered rendered to the occupant if they are primarily for his convenience and are other than those usually or customarily rendered in connection with the rental of rooms or other space for occupancy only. The supplying of maid service, for example, constitutes such service; * * *"*
(Emphasis ours.)

The language of the said Regulation is not restrictive but is obviously intended to permit a broad latitude in interpreting the type of service which is for the guests' convenience. The term "*for example*" is certainly not restrictive, therefore it cannot be argued that unless maid service is rendered the other services are not primarily for the guests' convenience, as appellant attempts to argue.

Approximately two blocks from the rooming house where plaintiff operated his rooming house is the new Los Angeles Statler Hotel. A brief comparison of the opera-

tions of the plaintiff and that of the Statler would seem to be helpful.

It will be noted first that the plaintiff charged from \$4.00 to \$6.50 a week for his accommodations. It is submitted that a room for one night at the Statler would cost more. It is obvious therefore that the income strata of the persons involved is vastly different and the quality and number of services may be different.

It is submitted that both operations furnish the essentials such as heat, light, the cleaning of public entrances, exits, stairways, the collection of trash, etc.

However, both the plaintiff and the Statler render a telephone answering and call service, direct callers to proper rooms, both provide a lobby, a desk clerk, both provide mail sorting services. However, while plaintiff did not give maid service, he did provide complete laundering and ironing facilities including electric irons, ironing boards, clothes pins, clothes lines, and wash tubs, the latter services not being rendered by the Statler. Plaintiff provided newspapers and magazines in his lobby, for his guests, a service not enjoyed by the guests of the Statler. Plaintiff made an additional charge for laundering of linens which he supplied. Analogous thereto are the Statler charges for the use of its valet services. The plaintiff provided cooking utensils and dishes, provided gas cooking stoves and electrical appliances and paid all the utilities charges in connection with their use. The Statler does not provide cooking facilities although it provides meals in the rooms, a service for which an extra charge is made. The Statler maintains 24 hour service and so did the plaintiff who maintained an apartment on the premises and was on call 24 hours a day.

The comparison illustrates that the services plaintiff rendered to his guests, considering their economic strata and the prices paid for the accommodations, were considerable and the services were of such a nature and sufficiency for such accommodations that appellee's income from his small business was, as a matter of law, self-employment income and not in the category of rentals from real estate under the statute and the said Regulation 4, Section 404.1052.

It is respectfully submitted that the District Court was correct in directing the Secretary to pay the old age benefits provided by the Social Security Act to plaintiff without remanding the matter for further hearing. Section 405(g), Title 42, U. S. C. A. There were no questions of fact requiring determination.

It is also respectfully submitted that the decision of the Secretary, even if she had considered the facts, is based on an erroneous conclusion of law and for that reason should be reversed. See *Carroll v. Social Security Board*, 128 F. 2d 876, 881 (8, 9).

Said case involved an appeal from a judgment of the District Court affirming a decision of the Appeals Council of the Social Security Board which held that the plaintiff therein was not an employee under the terms of the Social Security Act. The Circuit Court reversed the decision of the Board as well as the District Court decision affirming the Board's decision.

The Circuit Court in its opinion stated

"(8, 9) The purpose which Congress had in mind and the object sought to be accomplished by the enactment before us is aptly stated in *Helvering v. Davis*, 301 U. S. 619, 640, 672, 57 S. Ct. 904, 81

L. Ed. 1307, 109 A. L. R. 1319, *et seq.* That it should be liberally construed in favor of those seeking its benefits can not be doubted. While the question before us is not free from doubt—in fact, it is extremely close—we are of the opinion that plaintiff was an employee of the bank within the meaning of the Act and entitled to its benefits. In so concluding we have not overlooked the statutory admonition which binds us to accept the finding of the Social Security Board if supported by substantial evidence. The rule is not controlling, however, because the Board's decision, that plaintiff was not an employee within the terms of the Act, is without substantial support. *Moreover, in our view, the rule has no application because the question presents an issue of law rather than of fact. It involves a construction of the Act.*" (Emphasis ours.)

The question in the instant case is very similar. The question of whether or not plaintiff was a self-employed person within the meaning of the Act and whether or not the services rendered by the plaintiff brought him within the coverage of the Act was therefore a question of law.

For purpose of argument only, assuming that the Secretary had considered all of the facts (which she apparently did not) nevertheless in so misconstruing the statute (and Department Regulations) the Secretary made an erroneous conclusion of law in applying the facts to the applicable law and regulations.

The type and extent of the services rendered by plaintiff constituted the questions of fact which the Secretary had to determine but the legal effect of the facts was a conclusion of law. The problem before this court therefore is the same as in *Carroll v. Social Security Board (supra)*.

The question in *Burger et ux. v. Social Security Board et al.*, 66 Fed. Supp. 619 (affirmed in *Miller v. Burger*, 161 F. 2d 992 (C. A. 9)) was the same. The question was whether or not the plaintiff therein was an employee under the provisions of the Social Security Act. In reversing the Social Security Board the District Court said (66 Fed. Supp. 619, at p. 628),

“this claim presents ‘a clear-cut question of law and is for decision by the Court.’ * * * (citing authority including *Social Security Board v. Nierotko*, 66 S. Ct. 637, 643, 327 U. S. 358, 90 L. ed. 718, 162 A. L. R. 1445, from which the decision quotes). * * * ‘For the reasons stated I hold that the Board’s decision was contrary to law in refusing to recompute the monthly benefits * * *’ ”

Holding that plaintiff therein was an employee as a matter of law.

The Supreme Court of the United States in the said case of *Social Security Board v. Nierotko* stated,

“The Social Security Board and the Treasury were compelled to decide administratively whether or not to treat ‘back pay’ as wages and their expert judgment is entitled as we have said, to great weight. *The very fact that judicial review has been accorded, however, makes evident that such decisions are only conclusive as to properly supported findings of fact* * * * *Administrative determinations must have a basis in law* and must be within the granted authority. Administration when it interprets a statute so as to make it apply to particular circumstances acts as a delegate to the legislative power. * * * An agency may not finally decide the limits of its statutory

power. That is a judicial function. * * * *This is a ruling which excludes from the ambit of the Social Security Act payments which we think were included by Congress. It is beyond the permissible limits of administrative interpretation.*" (Emphasis ours.)

The writer does not have the temerity to try to improve on the eloquency and cogency of these statements of Mr. Justice Reed and submits that they are applicable to the instant case.

In *United States v. La Lone*, 152 F. 2d 43 (C. A. 9), cited by appellant in her brief, the court said:

"* * * The Board's decisions interpreting the Act and regulations are entitled to weight; the Board's findings of fact, *if supported by substantial evidence*, are conclusive." (Emphasis ours.)

In *Miller v. Burger*, 161 F. 2d 992, 995, the court said:

"While the findings of fact of the Social Security Board are supported by the evidence, we think its decision was incorrect when measured off against the language of the Act and the intent of Congress in adopting the 1939 amendment thereto."

The Court also stated (p. 994) that

"We believe the ultimate question presented to the lower court was one of law,"

and affirmed the District Court's reversal of the Social Security Board.

It is clear from the foregoing two cases that the question of the construction of the Social Security Act for the purpose of determining the intent of Congress and

applying the law to the facts are questions of law. The decision of the Secretary is entitled to weight only, even if the findings of fact had been supported by substantial evidence. If this were not true then the decision of an administrative officer would be more conclusive than if decided by a trial court. Such is not the law.

Whether Congress intended under the 1950 amendment that a person receiving income under the same circumstances as the plaintiff herein, is entitled to benefits under the Act is an ultimate question of law. While the decision of the Secretary is entitled to weight if based on findings of fact which are supported by substantial evidence, such decision is not controlling if it conflicts with the intention of Congress in passing the statute (1950 Amendment here).

In the instant case it is clear from the legislative history (*supra*) that Congress did intend to include within the provisions of the Act persons deriving income from self-employment in the manner which plaintiff derived his income.

This was a question of law upon which the courts could be called to review as was done in this proceeding. The District Court's decision as to the law was correct and justified the reversal of the Secretary's decision.

POINT THREE.

The Law Requires That the Secretary Make Findings of Fact. None Were Made. The Decision of the Secretary Was Nothing More Than a Conclusion of Law Following a Recital of the Applicable Provisions of the Law.

Section 405(b), Title 42, U. S. C. A., reads:

“(b) The Administrator (now Secretary) is directed to make findings of fact, and decisions as to the rights of any individual applying for a payment under this sub-chapter.”

Subdivision (g) of said Section 405, providing for a review of the Administrator's (now Secretary's) decisions states,

“(g) Any individual, after any final decision of the Administrator (now Secretary) made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision. * * *. *The findings of the Administrator as to any fact, if supported by substantial evidence, shall be conclusive,* * * *” (Emphasis ours.)

A reading of the Secretary's decision makes it at once clear that it is not supported by any evidence let alone substantial evidence, and is in the nature of conclusions of law, not findings of fact.

The Secretary's decision after a recital of the statute and regulations, reads [R. 37-38]:

“Since section 404.1052(a)(3) of the Regulations No. 4 provides that the furnishing of heat and light,

the cleaning of public entrances, exits, stairways, and lobbies, the collection of trash, etc., are not sufficient services in connection with the renting of rooms in rooming houses, it is the Referee's opinion that similar services rendered in connection with an apartment house are believed insufficient in connection with the renting of apartments in an apartment house, furnished or unfurnished, and that the rentals continue to be excluded as rentals from real estate. The claimant does not allege he is a real estate dealer.

"It is the finding of the referee that the claimant needed six quarters of coverage for a fully insured status; he had none, and thus was short six quarters of coverage to be termed a fully insured individual. The referee further finds that rentals from units of a rented apartment house in 1951, 1952, and up to January 19, 1953, constitute rentals from real estate and thus was excluded as net income from self-employment.

"Inasmuch as the claimant did not meet one of the principal requirements for entitlement to old-age insurance benefits, *i. e.*, he was not a fully insured individual, it is the decision of the referee that the claimant is not entitled to the benefits for which he has filed application."

This is the manner in which the Secretary disposes of all the evidence before her including the letter of June 9, 1953 [R. 66-68], which the referee acknowledged was in his possession at the hearing and which he indicated was being considered as evidence. [See R. 49, 3rd question from bottom of page.]

The Secretary ignored additional services rendered by plaintiff to his guests as shown by the uncontradicted

evidence such as telephone answering and call service, sorting mail and placing same in individual boxes, maintaining lobby with magazines and newspapers, providing linens, providing complete laundering facilities including wash tubs, clotheslines, clothespins and electric irons, providing a manager and desk clerk, being himself on call 24 hours a day to take care of any needs of the guests, providing all of the repair work necessary for the rooms or equipment, complete renovating of the rooms, supplying of all utilities including gas, water and electricity, supplying gas stoves, paying the utilities charge therefor, supplying all of the furniture and appliances, supplying cooking utensils and dishes, providing brooms for general use of the guests, and other services. [R. 29-33, 44-50, 66-68.]

It is at once obvious that the decision of the Secretary is a confused mixture in the nature of conclusions of law. There are *no* separate findings of fact.

The statute above quoted requires that the Administrator (Secretary), among other things, make (1) findings of fact, and (2) decisions as to the right of any individual applying for payments under the Act.

While the statute does not require specifically that the findings of fact be separate from the "decisions" it seems logical if the findings of fact are to be subject to judicial review to determine whether they are supported by substantial evidence that they must be stated separately. Otherwise how can any proper review of findings of fact be made.

Findings of fact and conclusions of law are always separated when made by a trial court in both our State and Federal Courts. As long as no definition of findings of fact is made the only logical conclusion that can be reached is that it means findings of fact as understood in our courts. It follows then because the courts require separate findings that the purpose of the statute was to maintain a standard of procedural due process of law at least similar to that of the courts and therefore under the statute separate findings of fact are required.

For purposes of convenience the above quoted portion of the Secretary's decision will be referred to as the "findings" unless otherwise pointed out.

These "findings" are obviously so incomplete and ignore so much of the evidence as to be no findings and of no value or assistance in determining whether the referee did or did not consider the evidence except as by omission they show that such consideration was not given.

The provisions of Section 405(g), Title 42, U. S. C. A., directing the Administrator (now Secretary) to "make findings of fact" can only be interpreted to mean "findings of fact" from which a reviewing court can determine what the Administrator (now Secretary) did find as a fact in order to support his conclusions.

The very fact that the Social Security Act provides for judicial review Section 405(g), Title 42, U. S. C. A., makes it clear that the Court must have "findings of fact" before it which meet some reasonable standard of

competence from which a proper and careful review of the decision can be made. Token findings of fact are certainly not sufficient. Mere lip service to the provisions of the statute do not satisfy the requirement of due process of law guaranteed by the Fifth Amendment to our Constitution.

The administrative branch may not use a procedural ruse to deprive the plaintiff of substantive property rights. Our judicial system is not sterile and our courts have not abandoned their place in our governmental system to the whim of an administrative officer whose actions may be masked in the guise of token findings of fact.

That the referee, in making his so-called "findings" apparently completely misunderstood the applicable law and regulations, is shown in the first paragraph of the quoted portion of his decision where he directs his attention to those services which are *not* sufficient to remove payments for the occupancy of space from the category of rentals from real estate, *whereas he should have found what were all of the services rendered by plaintiff* and based on such finding determined whether such services *were sufficient*. Certainly, therefore, the "findings" are not supported by substantial evidence.

The remainder of the so-called "findings" of the Secretary are actually conclusions of law reached from the aforesaid incorrect and incomplete basic premises.

The plaintiff does not wish to burden the court with long citations on the law covering substantial evidence and

judicial review of administrative decisions, however a few brief citations it is believed may be of assistance to the court. In the case of *Walker v. Altmeyer*, 137 F. 2d 531 cited by the Secretary in her brief, the court reversed the District Court which had reversed the Administrator. However, in that case it is apparent that the referee had made complete findings of fact.

In *United States v. La Lone*, 152 F. 2d 43 (C. A. 9), cited by appellant on page 16 of his brief, the court said on page 44:

“We do not deem it necessary to relate in detail the facts as found by the Referee showing the relationship between La Lone and Barrett & Co.”

This language indicates that in that case the referee did make findings of fact in some detail.

As pointed out above, in the instant case the “findings” of the Secretary indicate that much of the evidence was not even considered. They are not supported by substantial evidence but are based upon the omission of evidence from consideration and cannot therefore be accepted as conclusive.

POINT FOUR.

There Was No Substantial Evidence to Support the Findings of the Secretary and Her Decision Based Thereon.

There was no conflict in the evidence. The uncontradicted evidence, as indicated by our statement of facts hereinabove set forth with supporting references to the transcript, and the references to the facts which we have heretofore made in this brief, particularly under POINT THREE, show conclusively that the evidence is all in favor of appellee's position and no substantial part of it in support of the decision of the Secretary.

As the trial court indicated in its Memorandum of Decision [R. 72]:

"There is no specific indication, nor any implication, in the referee's decision that he did not believe any of the plaintiff's evidence. While he undeniably had the power to disregard those parts of the plaintiff's testimony which he deemed untrue, it appears obvious that, rather, he took the facts as testified to by the plaintiff and corroborated by the documentary evidence, and, on the basis of these facts, concluded that the plaintiff was not within the definition of self-employed but, instead, derived his income from the rentals of real estate and thus was not entitled to benefits. Thus the material facts can be adduced by an examination of the plaintiff's testimony and the exhibits that were introduced, which include a statement by the plaintiff to the board, and a letter written by him to the referee.²

²"There is no indication that the plaintiff was represented by counsel at the hearing. Rather, it appears that the examination was conducted by the referee. It is apparent that plaintiff's case was not presented as vigorously as it might have been. (63)"

POINT FIVE.

Answering Specific Arguments in Appellant's Brief:

- A. The District Court Did Not Apply a Different Standard From That Set Forth in the Administrative Regulation But Applied That Standard in Its Proper Sense.
- B. Counsel for the Secretary Attempts to Justify Her Decision Without Reference to Specific Findings and by, in Effect, Making New Findings in Her Brief Herein.
- C. Appellee Concedes He Is Not Entitled to Recover Costs of Suit.

These are discussed separately below:

- A. The District Court Did Not Apply a Different Standard From That Set Forth in the Administrative Regulations But Applied That Standard in Its Proper Sense.

The Secretary in her brief under Point I makes a fundamental error. She states:

“The District Court erred in applying a Standard for Determining Whether Appellee's Income Was Derived from Rentals from Real Estate Which Differed from the Standard Set Forth in the Administrative Regulation.” (App. Br. p. 10.)

The District Court did not attempt to apply a different standard. It interpreted and applied the administrative regulation to the facts in order to arrive at a proper conclusion of law [R. 70, 72, 74-76], after the Secretary's failure to do so. The District Court did not have the benefit of separate findings of fact and conclusions of law. The Secretary's decision, after a recital of the statute and regulations, was a confused mixture of conclusions of law and of some facts, ignoring other facts. The Sec-

retary apparently did not apply the standard set forth in the administrative regulations therefore it was left to the court to apply the applicable law and regulations.

The Secretary in her brief states on page 13 thereof:

“The Court indicated that the *basis* of its decision was the bare statutory provisions without regard to the interpreting regulations yet nowhere was a finding made that the regulation is unreasonable or inconsistent with the ‘statute.’ ”

This position is completely untenable. The District Court makes it clear without the slightest doubt that it did consider the administrative regulations. A glance at the court’s memorandum opinion *in which it quotes from the Regulations* [R. 69-70] shows that.

Of course, the administrative regulations, as such, have no existence independent of the basic statute. When a statute is applied to a particular set of facts, even though regulations are consulted for the purpose of giving the effect to the statute which Congress intended it to have, nonetheless it is the statute, *not the regulation*, which gives life to the particular activity covered by the statute.

In making findings a court must set forth the ultimate facts found to be true. The finding, therefore, had to relate to what is covered by the statute, not by the regulation.

The only reasonable conclusion that can be reached, therefore, is that the administrative regulations unless found not to be applicable, or unconstitutional, are deemed to have been accepted as valid. And since it is the statute (and the constitution) from which the activity derives its life, the court’s findings must so indicate and a finding that the statute covers a particular activity indicates the

ultimate question determined by the court. Plainly, therefore, the Secretary's argument is not here applicable.

However, following the Secretary's argument to its logical conclusion would result in clear constitutional violations. The administrative branch cannot usurp the prerogatives of the legislative and judicial branches. If the courts are bound by the interpretations of the law in administrative regulations and cannot legally construe the statute, then the courts have abandoned their constitutional prerogative to the administrative branch and have become the handmaidens of referees and hearing officers. If this were true, the fundamental safeguard of our American liberties, to-wit, the separation of powers between the legislative, judicial and executive branches of government, would have broken down. This cannot be the situation. The courts cannot be bound by administrative regulations in construction of a statute although the regulations are entitled to great weight.

The authority is abundant but we have only to look to the case of *Social Security Board v. Nierotko* (*supra*) to resolve any questions there may be in this connection.

B. Counsel for the Secretary Attempts to Justify the Decision Without Reference to Specific Findings, and by, in Effect, Making New Findings in Her Brief Herein.

The Secretary's brief (beginning at the bottom of page 16 through to the top of page 20) attempts to justify her decision and conclusion by referring to various criteria both in and out of the record (such as the reference to Los Angeles Municipal Code provisions referred to in Footnote 8, App. Br. p. 20).

The strikingly obvious thing about this attempt to justify the Secretary's decision is that counsel for the Secretary are applying their own standard based on their own interpretation of the evidence in the record. There is no reference to specific findings of fact of the Secretary. There was no evidence as to the Los Angeles Municipal Ordinances in the record.

There are only general references to the "findings" and to the "decision" of the Secretary. The reason for this is, of course, that there were no specific findings of the Secretary to which her counsel can refer or upon which she can rely or which support her decision. Counsel for the Secretary may not now, in appellant's brief, substitute new findings of fact for those which should have been made, while at the same time trying to show that the Secretary did make findings of fact which were supported by substantial evidence and that her conclusion based thereon was conclusive as argued.

The District Court determined that the Secretary's findings of fact, if they could be called findings of fact, were not supported by substantial evidence and therefore the court had to review the record and from said record make detailed findings of fact to support its conclusion and judgment that plaintiff was entitled to benefits under the Act. This was within the District Court's power under Section 405(g) of the Act, 42 U. S. C. A., which states in part:

"The Court shall have power to enter, upon the pleadings and transcript of the record, a judgment

affirming, modifying, or reversing the decision of the Administrator, with or without remanding the cause for a re-hearing.”

The District Court’s findings of fact, which are supported by the evidence and the court’s decision thereon surely are entitled to no less weight than that of the Secretary would have been if proper findings had been made and likewise supported.

The District Court’s findings of fact herein being supported by the evidence and the conclusions of law being in accord with the statute, administrative regulations, and the legislative history, its judgment must be affirmed by this court.

C. Appellee Concedes That He Is Not Entitled to Recover Costs of Suit.

Under Point III, page 20, of the Secretary’s brief, she contends that the District Court erred in awarding costs against her in her official capacity.

Plaintiff concedes that under the case of *Ewing v. Gardner*, 341 U. S. 321, cited by appellant, there was error in awarding costs against the Secretary. However, plaintiff wishes to point out that this is the only error in the District Court’s decision.

In the said case of *Ewing v. Gardner (supra)* the Circuit Court of Appeals had affirmed the District Court which had reversed the decision of the Administrator. The Supreme Court reversed the Circuit Court (and the District Court) *only as to the awarding of the costs of suit*

against the Administrator. The reversal of the Administrator's decision by the judgment of the District Court affirmed by the Circuit Court, became the final judgment in the case *except only* as to costs.

Summary.

Appellee respectfully submits that the judgment of the District Court should be affirmed, but without costs, for the following reasons:

1. The remedial provisions of the Act should be construed liberally in favor of those intended to be benefited thereby and the 1950 amendment was intended to broaden the scope and increase the number of persons covered by the Act. The exception excluding "rentals from real estate" should be strictly construed.

2. There were no questions of fact involved. The evidence was uncontradicted. The only question was of law, to-wit: Did the appellee have self-employment income thereby entitling him to the benefits of the Old Age and Survivor's Insurance Act. The District Court decided, as a matter of law, that the facts established that the appellee did derive his income from services rendered as a self-employed person in connection with his business in the operation of a rooming house or apartment hotel, and not from rentals from real estate.

Plaintiff owned no real estate and paid to the owner of the same the full rental value of the portion of the building he used in his business. The rental was deducted in determining the self-employment income

upon which he paid the Social Security taxes and upon which his claim for benefits is based.

The services rendered by appellee were the type such as are rendered in low priced hotels and included services primarily for the convenient use and occupancy of the premises by the guests as well as services which were merely custodial in nature.

The statute (and the 1950 amendment) and the regulations (based on the legislative history) leave only the inescapable conclusion that Congress intended that payment for the occupancy of rooms where services were rendered of the type rendered by appellee do not constitute rentals from real estate.

3. The Secretary did not make findings of fact as required by the provisions of the Act. The decision of the Secretary was nothing more than conclusion of law following a recital of the provisions of the law. It can only be assumed therefore that the Secretary ignored a great portion of the evidence before her.

The only portion of the Secretary's decision which might conceivably be considered a finding of fact was not supported by any of the evidence let alone substantial evidence.

If the Secretary did consider the evidence her conclusion was based on an erroneous conclusion of law.

4. There was no substantial evidence to support the findings of the Secretary and her decision based thereon. The evidence was uncontradicted and all in support of appellee's position.

5. If appellee had rendered the same services as employee of another apartment hotel operator as he rendered in his own business as a self-employed person he would unquestionably be entitled to the benefits he seeks. Thus he is peculiarly within the classification of persons which the 1950 amendment was intended to bring within the protection of the social security system.

Respectfully submitted,

GIRARD F. BAKER, and

JOHN W. ERPELDING,

Attorneys for Appellee Ralph B. Thorbus.

No. 14575

In the United States Court of Appeals
for the Ninth Circuit

OVETA CULP HOBBY, SECRETARY OF HEALTH, EDUCATION,
AND WELFARE, APPELLANT

v.

RALPH B. THORBUS, APPELLEE

APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

WARREN E. BURGER,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
SAMUEL D. SLADE,
RICHARD M. MARKUS,
Attorneys,
Department of Justice.

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PAUL P. O'BRIEN,
CLERK

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APPEAL FROM UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

REPLY BRIEF FOR APPELLANT

This reply brief is filed in answer to certain contentions made in the appellee's brief not covered by our main brief. We consider first the statutory and regulatory standard for determining Social Security coverage, next the applicability of the facts in this case to that standard, and finally the procedure involved in reviewing this determination by the Secretary.

1. *The Standard.* In his brief, appellee makes no contention that the administrative regulation (Social Security Regulation 4, Section 404.1052) is invalid as contrary to the language or purpose of the Social Security Act. Thus the only questions involved in

determining Social Security coverage, for the purposes of this case, are what meaning should be given to the regulation and whether the facts of this case entitle appellee to coverage within the regulation as thus interpreted.

Appellee urges that the intention of the statute and the regulation is to provide coverage for self-employed persons who put forward substantial personal effort in their form of employment. If such were the case, certainly the Act would establish coverage for farmers, doctors, lawyers, dentists, osteopaths, veterinarians, chiropractors, naturopaths, optometrists, Christian Science practitioners, architects, public accountants, funeral directors, professional engineers, holders of public office, and ministers. Yet persons deriving their income in any of these occupations are specifically excluded from coverage by the statute. Sec. 211 (a) (2), 64 Stat. 502, 42 U. S. C. 411 (a) (2); Sec. 211 (c), 64 Stat. 502, 42 U. S. C. 411 (c). An examination of the legislative history leading to the 1950 amendments, which establish coverage for self-employed persons, demonstrates that the exclusion of certain occupations from coverage was based on two considerations: (1) Congress was not convinced that a majority of the individuals in these occupations desired to be covered, and (2) Congress was determined to establish compulsory coverage with no option in the individual as to coverage, for all groups included. See Sen. Rep. 1669, 1950 *Code Cong. Serv.*, pp. 3288, 3299; H. Rep. 1300, 81st Cong., 1st Sess. 9-10; 95 *Cong. Rec.* 13821, 13836, 13900, 13914, 13921, 13947, 13960-61; 96 *Cong. Rec.* 8491, 8509, 8565, 8797,

8799-8810. The reasons why persons in the excluded occupations preferred not to be covered undoubtedly varied considerably between occupations and between the persons within each of them. Two reasons for the lack of interest in being covered were ascribed, by various Congressmen during the debates on the bill, to be (1) the people in these professions often had not had employees under their supervision from whose experience they could learn to appreciate the advantages of coverage, and (2) in these fields of endeavor it is common for men to continue working after passing 65 so that the benefits of coverage would often fall short of the forced contributions of Social Security taxes. See 95 *Cong. Rec.* 13821, 13900, 13917, 13922, 13928, 13965; 96 *Cong. Rec.* 8588.

It is quite conceivable that apartment house operators could have been motivated by either or both of these factors. An apartment house characteristically has few employees so that the former provisions of the Act, which denied coverage to employees in an establishment with less than eight workers, would have prevented most apartment operators from having any direct contact with the possible advantages of coverage. In the same way, it is not unusual for apartment house operators to continue their self-employment a considerable number of years after passing the age of 65. Indeed, reference to the facts in this particular case shows that appellee had only one employee, that he continued to receive income as an apartment house operator until he was 73 years old, and that he would have continued to derive income from this source even longer if it were not for circumstances

totally unrelated to his health and age. We submit, therefore, that appellee's contention that Congress intended to provide coverage whenever income is derived from substantial personal efforts is unfounded; the real basis for inclusion and exclusion was a belief by Congress that the majority of persons in appellee's field of employment do not desire coverage at this time.

In a similar vein, appellee contends that the provisions establishing coverage are remedial and ought to be liberally construed and that exceptions to coverage should be strictly construed so as to minimize the number of persons not covered. This contention, as applied to this case, denies the very basis for exclusion used by Congress. Appellee would, in effect, compel others in a similar position to pay Social Security taxes and to submit to coverage, even though Congress has determined that they do not desire coverage. It is not our contention that the Social Security Act, which is in part a taxing statute, should be strictly construed so as to limit its application to those clearly covered, as has been done in treating other tax statutes; rather we argue only that the fair intendment of the Act and regulations should be applied using the normal rules for reasonable construction.

Finally it should be remembered that the regulation here involved is the joint product of the Social Security Administration and the Treasury Department. Failure to give great weight to their interpretation of the regulation, as consistently applied to cases such as the present one, would ignore their common ex-

pertise in this field generally and in the treatment of this specific problem more particularly. Congress established the power of these two expert bodies to issue and apply regulations, and in that manner, it is often said, delegated a portion of its legislative authority. We do not suggest that the courts are absolutely bound to accept the administrative interpretation of its own regulation, but we do submit that the rejection of the joint administrative interpretation is a matter of some gravity and should not be done without substantial reason. See *Bowles v. Seminole Rock & Sand Co.*, 325 U. S. 410, 414 ("But the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.")

2. *The Facts.* Since the governing regulation provides that one who operates a hotel¹ is covered by Social Security but that one who operates an apartment is not, the crucial question would seem to be whether appellee's establishment was more like an apartment or a hotel within the meaning of the regulation. Appellee's brief sets forth at length the services which he states were performed at his establishment and which he claims clearly require a finding that it was more like a hotel than an apartment. These services and facilities are set forth and disposed of individually in appellant's brief at pp. 17-20. In his brief, appellee attempts to liken his situation

¹Since the regulation treats boardinghouses and hotels as similar, varying perhaps in the grade of services and facilities provided, the two terms are used interchangeably in this brief.

to that of the nearby Los Angeles Statler Hotel by going outside the record to examine the comparable services and facilities provided.² Assuming, *arguendo*, that the facilities and services provided at the Statler Hotel had been presented to the administrative agency and that they therefore could be considered in this proceeding to review, there seems to be no substance to this comparison. A reading of the facts as set forth in appellee's brief (p. 13) merely emphasizes the fact that the Statler Hotel provides extensive personal services to its guests, including services rendered in the leased premises, while the Knickerbocker Apartments (appellee's establishment) rendered services primarily to the building and only incidentally to the occupants and rendered no services within the leased premises.

Passing from this single example to more general definitions of the two types of accommodations, we find that the normal distinctions made between a hotel and an apartment are that (1) a hotel room provides eating facilities, if at all, outside the rented room, while an apartment provides full housekeeping facilities including food preparation utilities, (2) a hotel provides extensive personal services to the

² In this connection it is interesting to note that appellee's brief complains (pp. 28-29) that our principal brief unfairly relied upon the relevant provisions of the Los Angeles Municipal Code which do not appear in the record. Our intention was to suggest that the allegedly extensive services provided by appellee were in fact largely required by law. It is our understanding that the trial court and this Court are authorized to take judicial notice of such ordinances. Cal. Code Civil Proc., Sec. 1875 (1949 ed); *Gerling v. Baltimore & O. R. R.*, 151 U. S. 673; see A. L. I., *Model Code of Evidence*, Sec. 802.

guests, while an apartment house provides many fewer services of that type, (3) a hotel caters largely to transients, while an apartment house is conducive to longer tenancies, and (4) a hotel provides services within the leased premises, generally including maid service, while an apartment house leaves such domestic operations to the tenants.³ These distinctions inevitably point to the conclusion that appellee's establishment was an apartment house. In any event, this is a question of fact which was resolved by the administrative ruling and which should not be upset, as discussed *infra*, unless unsupported by substantial evidence in the administrative record. Appellee finally suggests that the Knickerbocker Apartments is in reality a hotel for lower income classes, but it does not seem reasonable to explain away the vital differences between his establishment and a hotel on this theory. It may well be that there are boardinghouses available to persons in lower classes in the Los Angeles area which do not provide all the apartment-like facilities that appellee does (*e. g.*, stoves, ice boxes, etc.) but which do provide the missing hotel-like services. Or, on the other hand it may be that persons in these economic circumstances cannot and do not live in hotels.

³ Compare *Black's Law Dictionary* (4th ed. 1951) 121 ("apartment house") with *id.* at 872 ("hotel"); compare *Webster's New International Dictionary* (2d ed. unabridged 1948) 122 ("apartment house") with *id.* at 298 ("boardinghouse") and *id.* at 1205 ("hotel"); see also *Heather Hall Corp. v. Haines*, 90 F. Supp. 280 (D. Mich.); *Woods v. Drolson*, 75 F. Supp. 758 (D. Minn.); *Biber v. O'Brien*, 138 Cal. App. 353, 32 P. 2d 425; *Edwards v. City of Los Angeles*, 48 Cal. App. 2d 62, 119 P. 2d 370.

3. *The Procedure.* Sec. 205 (g) of the Social Security Act, set forth in appellant's appendix at pp. 24-25, limits the scope of review of the Administrator's findings of fact. "The findings of the Administrator as to any fact, if supported by substantial evidence shall be conclusive * * *." Appellee contends that the statutory rule is inapplicable here since the Administrator made no clear and unambiguous findings, and since the question involved is solely one of law. With respect to the former of these two arguments, it should be noted that the referee did make findings of fact, although appellee apparently considers them too vague to merit the protections of Sec. 205 (g). The referee set forth specifically the relevant facilities and services which he considered were performed (R. 34-35) and proceeded to apply these facts to the governing regulations (R. 35-38).⁴ Furthermore, if appellee is correct in his contention that the administrator's findings were too vague to permit reasonable review, it was the district court's duty to remand the case to the agency with instructions to make more specific findings, rather than determining the facts for itself without reference to a previous administrative decision. Cf. *Magner v. Hobby*, 215 F. 2d 190 (C. A. 2). To do otherwise would challenge the very foundation of such well established legal doctrines as primary jurisdiction and exhaustion of administrative remedies, and would exceed the district court's statutory jurisdiction under Section 205 (g).

⁴ Reference to these findings was made in appellant's brief at p. 19, fn. 7.

Appellee also argues that the referee's findings, if sufficiently clear to permit review, are clearly erroneous since they do not include all of the services and facilities allegedly provided at the Knickerbocker Apartments. A requirement that the referee must accept every statement made by a claimant as true would effectively destroy the hearing procedure. It is the referee's function to listen to an *ex parte* presentation of a claimant's evidence, often without considering any contrary testimony, and to evaluate the reliability of that testimony, taking into account its reasonableness and the credibility of the claimant. In this sense the referee assumes the role of a trial jury, except that the referee is aided in his deliberations by his own extensive training and experience in the field involved.

Finally, appellee argues that no restriction on the courts' right of review exists in this case because the Administrator's determination was wholly one of law. It does not seem that the question whether appellee's establishment is more like an apartment than a hotel is an issue of law (cf. *Friedman v. Shindler's Prairie House*, 224 App. Div. 232, 236, 230, N. Y. S. 44, 49, affirmed 250 N. Y. 574, 166 N. E. 329), but even if it were it would be a question of interpreting and applying an administrative regulation. For the reasons stated *supra*, pp. 4-5, the administrative construction and application of its own regulation should be given great weight. This is doubly true where, as here, the regulation represents and is uniformly applied by two expert agencies.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the court below should be reversed.

WARREN E. BURGER,
Assistant Attorney General,
LAUGHLIN E. WATERS,
United States Attorney,
SAMUEL D. SLADE,
RICHARD M. MARKUS,
Attorneys,
Department of Justice.

